CASES

ARGUED AND DETERMINED

IN

THE SUPREME COURT

OF

THE STATE OF MISSOURI

JULY TERM, 1873, AT JEFFERSON CITY.

WILLIAM JONES, *et al.*, Respondents, *vs.* ANDREW SHAW, *et al.*, Appellants.

1. *Jeofails, statute of—Mechanic's Lien—Date of furnishing supplies.*—In a suit on a mechanic's lien, the petition stated that on a certain day and within six months after furnishing the supplies, the plaintiff levied his lien, and the exhibit to the petition stated the dates and the items. *Held*, this was sufficient after verdict.
2. *Practice, civil—Appeals—Transcript—Service—Jury waived.*—The objections, that the appellant was not served, and that a jury trial was not waived, cannot be sustained in this Court, when the transcript states to the contrary.

Appeal from Bates Circuit Court.

T. J. Galloway, for Appellants.

WAGNER, Judge, delivered the opinion of the court.

There was no motion filed for a new trial in the court below, nor was there any exception saved to any question of fact. The reason assigned in the motion in arrest, that the petition did not state facts sufficient to constitute a cause of

CASES

ARGUED AND DETERMINED

IN

THE SUPREME COURT

OF

THE STATE OF MISSOURI

JULY TERM, 1873, AT JEFFERSON CITY.

WILLIAM JONES, *et al.*, Respondents, *vs.* ANDREW SHAW, *et al.*, Appellants.

1. *Jeofails, statute of—Mechanic's Lien—Date of furnishing supplies.*—In a suit on a mechanic's lien, the petition stated that on a certain day and within six months after furnishing the supplies, the plaintiff levied his lien, and the exhibit to the petition stated the dates and the items. *Held*, this was sufficient after verdict.
2. *Practice, civil—Appeals—Transcript—Service—Jury waived.*—The objections, that the appellant was not served, and that a jury trial was not waived, cannot be sustained in this Court, when the transcript states to the contrary.

Appeal from Bates Circuit Court.

T. J. Galloway, for Appellants.

WAGNER, Judge, delivered the opinion of the court.

There was no motion filed for a new trial in the court below, nor was there any exception saved to any question of fact. The reason assigned in the motion in arrest, that the petition did not state facts sufficient to constitute a cause of

action, in not stating the time when the materials were furnished, for which the lien was sought to be enforced, does not appear to be good.

Accompanying the petition was an exhibit giving the dates and the items; and there is an express averment in the petition, that the plaintiffs did on a certain day, and within six months after furnishing the materials, file in the office of the Clerk of the Circuit Court, their affidavit and statement, and bill of particulars, for the purpose of enforcing their lien. This was surely sufficient after verdict.

The objection raised, that Shane, who is the only party appealing, was not duly served with process, cannot be inquired into.

The judgment states, that an alias writ was issued as to him, and that it was duly served: the writ nowhere appears in the record, and we are bound to take the recital as true.

The same may be said with reference to waiving a jury. The record states, that a jury was waived, and we must yield faith and credit to the statement.

These are the principal points raised, and none of them have any merit, nor is it pretended that the party had any just or substantial defense to the plaintiff's claim.

The judgment is unquestionably right, and should be affirmed.

Judges Vories and Sherwood concur, Judges Adams and Napton not sitting.

THE STATE OF MISSOURI, *ex rel.*, PHILIP PIPKIN, Relator, *vs.* GEORGE B. CLARK, State Auditor, Respondent.

State ex rel. Vail v. Draper, 50 Mo. 353, affirmed.

Mandamus.

Jno. L. Thomas, & Bro., for Relator.

1. If it be doubtful whether a law be constitutional or not,

the doubt shall by the court be resolved in favor of the law, and it shall be upheld. (Cool. Con. Lim., 182; 7 Ind. 326; 2 Iowa, 280; 12 Wheat., 270; 3 Dall., 386; 6 Cranch., 872; 2 Pet., 522; 1 Cow., 550; 4 Dall., 309.)

II. The General Assembly possesses the power to create new circuits, and to change the limits of old ones. (Con. of Mo., Art 6, § 14.)

III. The General Assembly can pass laws requiring the Judges of the Circuit to remove their residences, or vacate their offices. The shifting of the territorial jurisdiction of a judge is a widely different thing from abolishing his circuit, or attempting to oust him. The latter cannot be done; the former can. (Atty. Gen. vs. Missmore, 14 Wis., 163; Iris vs. Choate, 11 Ohio, 511; State vs. Staching, 7 Ind., 328.)

IV. The permanent establishment of the St. Louis Circuit Court, excludes the presumption, that any other is to be permanent, "*Expressio unius est exclusio alterius.*" (Sec. 15 Art. 6, Con.)

H. Clay Ewing, Attorney General, for Respondent, relied on, Vail vs. Draper, 50 Mo., 353, and the brief of Leonard in that case.

WAGNER, Judge, delivered the opinion of the court.

This is an application for a mandamus by the relator to require the State Auditor to draw a warrant in his favor for services, as Judge of the 26th Judicial Circuit. The question was before the court at the last July Term, in the case of State *ex rel.* Vail vs. The Auditor, when we determined that Vail was entitled to his salary, as judge for the said Circuit, and that the relator was not. We are now asked to review and reverse that decision. I have re-examined the question, and can perceive no reason for changing the views then entertained.

I fully concur in the reasoning, and in the conclusion arrived at by the court at that time, and am therefore in favor of dismissing the writ.

The other Judges concurring, the writ will therefore be dismissed.

JACKSON WILHITE, Respondent, *vs.* JEREMIAH WILHITE, Appellant.

1. *Statute, construction of—Executions statute on—Sheriff's sales—Essential recitals.*—The names of the parties to the execution, the date when issued, the date of the judgment, the description of the property, and the time, place, and manner of sale, are essential recitals in a Sheriff's deed, for property sold on execution, (W. S. 612, § 54,); all the other provisions relative to the recitals therein, may be regarded as simply directory. [Not in harmony with Crittenden vs. Leitensdorfer, 35 Mo. 239.]

Appeal from Texas Circuit Court.

Bland & Mitchell, for Appellant.

I. The essential recitals in a sheriff's deed, (W. S. 612, § 54,) are, the date of the execution, the time, place, and manner of sale, and a description of the lands sold. These recitals are all correctly made in the sheriff's deed to White, and are *prima facie* evidence that the sale was made according to law. (Tanner vs. Stein, 18 Mo. 580; Crittenden vs. Leitensdorfer, 35 Mo., 239.)

II. The object of the other recitals required by the said section, "the date of judgment and other particulars," are for the purpose of identifying the deed with the judgment, and where this can be done with reasonable certainty, the deed will be held good, notwithstanding a slight variance. (Stuart vs. Severance, 43 Mo., 322; Campbell vs. King, 42 Mo., 219; Jamison vs. Walker, 4 Wend., 462; Johnson vs. Davis, 18 Johns., 7.)

S. T. Williams, for Respondent.

The deed offered in evidence by defendant recites that judgment was rendered against Thomas Yates and F. M. Chambers, whereas, in fact the judgment was rendered against Chambers alone, and misstates the amount of the judgment. This deed could pass no title to appellant. (Crittenden vs. Leitensdorfer, 35 Mo., 239.)

WAGNER, Judge, delivered the opinion of the court.

This was an action of ejectment, in which the general issue was raised, and the trial was before a jury.

Both parties derived title to the lands from one F. M. Chambers. The plaintiff read in evidence a deed, dated July 11th, 1869, from Chambers to him, purporting to convey the land in controversy, and there rested.

The defendant read in evidence a deed by the sheriff, dated in April, 1867, and recorded a short time thereafter, conveying the land to him, and reciting an execution, judgment, etc., against E. M. Chambers, and Thomas Yates, for the sum of three hundred dollars and fifty cents, in his favor, and also reciting the fact, that the land was levied upon, and sold as the property of Chambers and Yates.

The plaintiff then read in evidence, from the Circuit Court records, a judgment entitled Jeremiah Wilhite vs. F. M. Chambers and Thomas Yates, which recited, that the plaintiff in that case dismissed his action as to Yates, and then followed the entry of judgment against Chambers for three hundred and fifty dollars.

It was shown on the trial, that this was the only judgment that Wilhite, the defendant in this case, had against Chambers, and that the plaintiff here was present at the sheriff's sale, when the land was bid in and purchased by the defendant.

The Circuit Court instructed the jury, that the variance between the judgment and the recitals in the sheriff's deed was fatal, and that the deed passed no title to the defendant, and that plaintiff was entitled to recover.

The jury then gave a verdict for the plaintiff, upon which judgment was rendered.

The question to be determined is, whether the recital in the deed of a judgment against Chambers and Yates, when, in fact, it was against Chambers only, and the mistake in the amount by stating that it was three hundred dollars and fifty-cents, when it was three hundred and fifty dollars, constitutes such a fatal variance as to destroy the defendant's title. The solution of this question will depend greatly upon the construction of our statute, as to what may properly be called directory, and necessary or essential recitals.

The 55th section of the statute in reference to executions

(1 W. S., 612,) declares, that the officer, who shall sell any real estate, shall make to the purchaser a deed, to be paid for by the purchaser, reciting the names of the parties to the execution, also a description of the property, the time, place, and manner of the sale; which recital shall be received as evidence of the facts therein recited.

This question was before this court in the case of Tanner vs. Stine, 18 Mo., 580.

That was a case, where a sheriff's deed was drawn in controversy, and the recitals in the deed were, that the land was exposed to sale, "at the court house door, in the City of St. Louis, during the———term of the———court of———, for the year eighteen hundred and forty———," and the deed was held to be void. It will be observed, that in the above case there was not simply a mistake or error, but a complete and total omission to comply with the statute.

The court, in the opinion, says: "The deed must recite the time, place, and manner of sale, and the recital of these facts in the deed is made the evidence that the law has been complied with. It was contemplated, that the deed upon the face of it should show, that the sale had been made at such a time as the law supposes would produce the most beneficial result. The recital of the mere day of sale would not satisfy the law, without showing that the day was within the term of the Circuit Court. This has been the uniform practice in this State. Then, without undertaking to say what recitals are directory, and what essential, we may safely declare, that the recital of the enumerated facts, the non-performance of which would render the sale void, is necessary."

The law required, that the sale should be made at a term of the court, and it was held, that the deed must show that this requirement was complied with. These things are expressly enumerated in the section, as matters necessary to be done, and they were wisely put in for beneficial purposes.

Having the sale take place whilst the Circuit court is in session, gives it publicity and attracts a large number of bidders.

In Kentucky, where the statute requires that the deed of the sheriff shall recite the execution, purchase and consideration, it was held, that though a deed under a sheriff's sale may not recite literally the execution under which a sale was made, yet if there was enough to ascertain the execution, the title will pass to the purchaser. (Sneed vs. Reardon, 1 Mar., 217.)

In most of the States it is decided, that it is sufficient if the deed recites enough to show that the officer had authority to sell. But these adjudications are based upon statutes differing from ours. The enumerated provisions of the statute, which would seem to be essential recitals, are the names of the parties to the execution, the date when issued, the date of the the judgment, the description of the property, and the time, place, and manner of sale. These inform everybody of everything necessary to be known, and all else may be regarded as simply directory. The deed in this case gives the correct time when the execution was issued, the date of the judgment, the description of the property, and the time, place and manner of the sale.

There was a valid judgment against the execution defendant Chambers, and the recital, that Yates was also a defendant, was immaterial. So in reference to the mistake in the amount of the judgment; they were both evidently clerical errors, and might well be disregarded. (Stewart vs. Severance, 43 Mo., 322.) They were matters of mere form, and not of substance.

We are aware that this opinion does not fully harmonize with the decision in Crittenden vs. Leitensdorfer, (35 Mo., 239,) but that case seems to have been hastily decided, and we do not concur in the result arrived at.

The present case furnishes an illustration of the wisdom of upholding judicial sales, when fairly conducted. The defendant here purchased the land, paid his money for it, took possession, and has continued to reside on it in the confident belief that he had a good title.

The plaintiff was present at the sale, and was cognizant of all the facts. But afterwards, discovering what he supposed

was a defect in the defendant's deed, and which would defeat his title, he buys the land of the execution debtor, and now seeks to oust the defendant. But we think, that he has wholly failed to present a case which would entitle him to succeed.

The judgment will be reversed, and the cause remanded. The other Judges concur.

JOSEPH SCHWICKERATH, Defendant in Error, *vs.* JOHN COOKSEY, *et al.*, Plaintiffs in Error.

1. *Equity—Mortgage—Misdescription of land—Sale—Bill by purchaser, to correct the description in the mortgage.*—A purchaser under a mortgage, cannot come into equity, requesting that other property, in the place of that sold and purchased, be subjected to his purchase on the ground that by mistake, the mortgage covered different property from that intended.

PER ADAMS, JUDGE, dissenting,—NAPTON, JUDGE, concurring.

2. *Equity—Mortgage—Misdescription of Land—Sale—Bill by purchaser to correct the description in the mortgage—Privies.*—Equity will entertain a bill by a purchaser under a mortgage, requesting that other property, in the place of that sold and purchased, be subjected to his purchase, on the ground that by mistake the mortgage covered different property from that intended,—as between the original parties and their privies.

Error to Morgan Circuit Court.

James A. Spurlock, for plaintiffs in error.

I. The purchaser at a sale, made by a mortgagee selling under a power, for the payment of debts, must take notice of the title and its defects. He buys at his own peril. (Barnard vs. Duncan, 38 Mo., 170.)

II. There is a want of privity, and there are no equities in the bill. (Haley vs. Bagley, 37 Mo., 363.)

Stover and Neilson, for defendant in error.

A court of equity will grant relief against mistakes in written instruments, such as correcting mistakes in the description of lands conveyed by deed or mortgage, at the instance of a purchaser at such trustee's or mortgagee's sale. (Waldron

vs. Letson, 15 N. J. Eq., 126; Young vs. Coleman, 43 Mo., 179; Corby vs. Bean, 44 Mo., 379; Jennings, vs. Brizeadine, 44 Mo., 332.)

SHERWOOD, Judge, delivered the opinion of the court.

The petition in this case alleged that Thomas Cooksey, in September, 1862, agreed to and did convey by mortgage deed to Morgan county, to secure an indebtedness due by him to said county, the northeast quarter of the southwest quarter of section 2, township 42, range 19, among other land then owned by him, and that said mortgage was duly recorded; that through the mistake of the draughtsman, a different forty, to wit: the northwest quarter of the southwest quarter of section 35, township 43, range 19, was inserted instead of the forty intended, and that Cooksey never owned the tract thus mistakenly inserted; that Cooksey died March 19, 1863, leaving defendants, except the justices of the Morgan County Court, as his heirs at law; that the mortgage was given to secure two promissory notes; that these notes were not paid when they fell due; that the sheriff of Morgan county on the 5th day of August, 1869, under the terms of the mortgage, sold to plaintiff the real estate "in said mortgage deed," at public sale, and on the same day executed to him a deed "to the real estate in said mortgage deed described."

The petition then concludes with a prayer, that the title of the heirs in the forty first described be divested, and that the same be vested in plaintiff, etc.

The county justices admitted the allegations of the petition. The heirs answered, admitting that Thomas Cooksey was the holder of the legal title of the lands mentioned and referred to in plaintiff's petition, but that the same was in trust for the use and benefit of John Cooksey, his father, who furnished the purchase money, and always held and enjoyed peaceable possession of the same, and opened a farm thereon. They denied that Thomas Cooksey ever agreed to execute to Morgan county, a mortgage for the land, that any mistake was made; or, that there was any land conveyed in the mortgage but

what was intended to be conveyed; and asserted that the mortgage was made in fraud of the rights of John Cooksey, who was in possession and the equitable owner. They also charged, that the plaintiff sold to Thomas Cooksey and Leopold Phillips his mill and lands, and induced Thomas Cooksey to mortgage his father's, John Cooksey's, land for plaintiff's debt, well knowing that defendant, John Cooksey, was the owner of, and in possession of the same, and had cleared a farm thereon; that plaintiff, in March 1867, presented his notes and accounts to Morgan probate court, against Thomas Cooksey's estate, and certain lands were thereupon by the order of the court released and relinquished to plaintiff, who, in consideration thereof, made a release to said estate, "of all demands." They denied that there was any legal foreclosure of the mortgage or any sale; stated, that plaintiff had no legal or equitable right to the lands described in the mortgage, much less to the lands in dispute, and they claimed the benefit of the statute of frauds, etc.

The plaintiff filed a replication, in which he denied many of the allegations of the answer, but did not deny that the mortgage was given to secure a pre-existing debt due to Morgan county by the plaintiffs, nor that he had sold to Thomas Cooksey and Leopold Phillips his mill and lands; nor that he presented his notes and accounts against the estate of Thomas Cooksey in 1867, had certain lands relinquished to him by the administrator, and that in consideration of such relinquishment he had executed to the estate of Thomas Cooksey, "a release of all demands;" nor that defendant, John Cooksey, had cleared a farm, etc., as alleged in his answer.

At the hearing, the plaintiff, Schwickerath, was introduced, and he testified, in substance, that in 1860 he sold some mill property to Phillips and Cooksey for $7,000; that they could only pay him $400 down, and that he was owing about that sum at that time; that Thomas Cooksey and Leopold Phillips gave their note to Morgan county for $400 with himself as security, Cooksey gave his mortgage to Morgan county to secure the payment of that note, and in that way they paid the $400

cash payment on the mill property. The mortgage was on Thomas Cooksey's farm, and plaintiff and another man were sureties on the note to the county; that he paid the debt and took an assignment of the note and had the mortgage property sold, and at the sale bought it in, and at the time he bought thought he was buying the Thomas Cooksey farm. The sheriff said it was the farm he was offering for sale.

At the time the mortgage was made, he knew the farm; Cooksey showed it to him. He did not show the corners, but where the land lay. It was improved to some extent, and John Cooksey, the father of the deceased, was living on it at the time and Thomas Cooksey was there also. A mistake had been made in the mortgage as described in the petition. Plaintiff then read in evidence the mortgage deed containing a description of the land as described in the petition, to secure two notes given by Thomas Cooksey, Leopold Phillips and plaintiff, one note for $240 68, and the other for $150 38, making about $400, to Morgan county, and which mortgage was conditioned that the sheriff might sell on default of payment. This mortgage is dated September 2nd, 1862.

Mills testified, on the behalf of plaintiffs, that Thomas Cooksey and his father lived on part of the lands mortgaged.

The defendants then read in evidence as follows: The order of the probate court showing, that on the petition of plaintiff, the court had, because of the insolvency of Thomas Cooksey's estate, ordered a relinquishment to be made of the land bought by deceased to plaintiff by the administrator on the best terms that could be agreed on; and the order shows that the indebtedness of deceased then amounted to $7,550. The report of the administrator showed he had agreed to relinquish the lands, mentioned in the order to plaintiff, and that the latter had agreed to accept the relinquishment in full satisfaction of Thomas Cooksey's part of the indebtedness, that is to say, in full satisfaction of one-half of said indebtedness. This report was made March 15th, 1867, and was approved.

The release by the administrator to plaintiff, is of the same

date as the approval of the report, and is on the same conditions as above mentioned, and recites the fact of Thomas Cooksey having purchased the undivided one-half of lot 2 of northwest quarter of section 6, township 43, range 19, of plaintiff for $3,000, on January 25th, 1861, which, with interest, amounted to $3,775 07.

Defendants then read the deed from the sheriff of Morgan county to plaintiff for the lands as described in the mortgage, showing sale, etc., after advertisement of the property as described in the mortgage. This deed is dated August 5, 1869.

They also read in evidence a deed of release from Leopold Phillips and wife for the whole of the northwest quarter of section 6, township 43, range 19, in consideration that plaintiff agreed to release Phillips from all indebtedness on their promissory notes which he held on said Phillips and Thomas Cooksey. This release is of the same date as the one from Cooksey's administrator.

Defendants also read in evidence a copy of what purports to be a record of the Morgan Circuit Court, showing a judgment of foreclosure in favor of plaintiff and against Phillips and Cooksey's administrator, wherein the debt is set down at $4,690 51, and an order made for the sale of the west half of lot 2 of the north-west quarter of section 6, township 43, range 19, and east half lot of same section, township and range; but the time when this was rendered does not appear. Defendants here rested.

The plaintiff then proved by Mills, that plaintiff paid off the notes mentioned in the mortgage of Thomas Cooksey, deceased, to the county in 1869 or '70; that he knew the Thomas Cooksey farm: the buildings were on northwest quarter section 2, township 42, range 19, and that the N. E. 1-4, of S. W. 1-4, section 2, township 42, range 19, was improved some years before; that plaintiff bought in the lands, and paid off the balance of the debt, as the lands did not bring enough. The court then found for plaintiff and a decree was entered accordingly; and this case comes here on a writ of error.

Cases in many points similar to the one here presented, have heretofore occupied the attention of this court.

In Haley vs. Bagley, 37 Mo., 363, where a mortgage had been executed by Bagley to Charles Haley, to secure a payment of a certain debt, the property misdescribed and the mortgage duly recorded, it was held that the purchaser, W. H. Haley, who bought under a sale made by the mortgagee, bought at his peril, as the mortgage was on record, imparting full notice and the sale open and notorious, and the fact that he was ignorant of the mistake, would not help him. And further, that there was no equity in the bill.

In Barnard vs. Duncan, 38 Mo., 170, it is said: "The title is on record; the records are open to all, and the purchasers can examine the title for themselves."

There can exist no doubt, as to the power of a court of equity to correct mistakes in instruments, and to reform conveyances, so as to make them speak the language originally intended. But the question at once arises, is this universally conceded power to be indiscriminately invoked? Is it to be applied to any and every case that may arise, regardless of well established equity precedents? By no means. In the present case the plaintiff bought the land as described in the mortgage—bought that which the sheriff advertised; which he sold, and which he conveyed; and the plaintiff now seeks, not to reform the mortgage, because that, forsooth, would, in order to be effectual, necessitate the reformation of the advertisement and of the sheriff's deed, but, seeing the absurdity to which such a wholesale application of the principle he so zealously contends for, would inevitably lead, he prays for a decree, in the nature, I suppose, of a sort of *equitable cut off*, to divest the title out of defendants, and vest it in himself. His theory is, that a court of equity should effectuate the intention of the parties; but is it the intention of a mortgagor, that his property shall be sold without advertisement? Can that condition precedent to a valid sale, if wanting, be supplied by the decree of any court? This question affords its own emphatic answer in the negative.

What rights did Morgan county acquire by reason of the

mortgage? Simply these: To have any mistake made in the description of the land, (when such mistake should be clearly and unequivocally established,) corrected, and then to foreclose the equity of redemption. Can the purchaser at a foreclosure sale, from the fact of his purchase, be placed in any higher or better position than the mortgagee? Can this be done, especially, when such mortgagee never even attempted to have any alleged misdescription corrected?

But we are referred to the case of Waldron vs. Letson, 14 N. J. Eq., 126, as sustaining the decree rendered in the court below. An examination of that case, however, shows it to differ widely from the one here. There, the property, including the thirty feet in dispute, had been for thirty years enclosed and known as the "tan-yard lot;" was sold as the tanyard property by the sheriff, was bought as such by the purchaser, who took possession of the whole property known and enclosed as the tanyard lot, and expended a considerable sum for repairing. And the defendant stood by, and permitted the property to be sold, and the purchaser to make improvements, without making known his title. There, the court says, in speaking about the thirty-foot strip of ground in dispute, "in the present case it is obvious that the discrepancy between the description and the advertisement, and the visible boundaries of the lot, as offered for sale, could only have been ascertained by actual measurement."

In the case we are considering, there was no "actual measurement" necessary. The property was described by its legal sub-divisions, and the particular forty-acre tract, about which this controversy arose, was situate miles away, in a different section and township from the one alleged to have been misdescribed, and nothing but an entire disregard of those precautions, which both law and equity enjoin of purchasers at public sales, could have misled the buyer in this instance.

In Waldron vs. Letson, *supra*, it was established by the most conclusive proof, that a mistake had been made in the description of a portion of the property intended to be con-

veyed. And it need scarcely be said, that the evidence in that record, falls far short of being conclusive here.

De Reimer vs. Cantillon, 4 John's Ch. 85, is cited by the court in Waldron vs. Letson, as sustaining the views in the latter case.

But in De Riemer vs. Cantillon, the only mistake was in the sheriff's deed. "The entire possession of the defendants" was sold. They were present at the sale and delivery of the possession of the land, "and assisted in carrying the contract into effect according to its true intent and meaning."

And that case, which resulted in a decree perpetually enjoining defendants from proceeding at law, evidently rests on the ground of equitable estoppel. And had the court in Waldron vs. Letson, based its conclusions on the same ground, no objection would be urged against the opinion therein delivered.

In conclusion, the case here differs *toto coelo* from that of Waldron vs. Letson, and from that of De Reimer vs. Cantillon. The allegations of the petition do not show, nor does the evidence offered in their support, that the plaintiff is entitled to equitable relief.

For these reasons the judgment will be reversed, and the petition dismissed.

Judges Napton and Adams dissent; Judges Wagner and Vories concur.

Adams, Judge, delivered the dissenting opinion.

This record seem to be badly made out, and it is difficult to make a proper statement. It appears, however, to be an equitable action to have the title of forty acres of land vested in the plaintiff.

It is alleged, that Thomas Cooksey, deceased, in his life time, made a mortgage on his farm to secure a debt to Morgan county. That this forty acres was a part of the farm, and was intended to be included in the mortgage, and was in fact, in contemplation of the parties, comprehended in the mortgage, but by mistake of the draughtsman, was omitted. The plaintiff, at the sale under the mortgage, bought all the land,

and supposed this forty acres was part of his purchase, and he paid for it as such.

The sale was made after the death of the mortgagor, and this suit was brought by plaintiff, as purchaser under the mortgage sale, to correct the alleged mistake by coercing from the defendants the title they hold as heirs of the deceased mortgagor.

The plaintiff introduced himself as a witness on the trial, and was objected to as incompetent on the ground that he was a party to the suit, and the mortgagor being dead, ought not to be allowed to testify in his own behalf. The court found the issues for the plaintiff, and made a decree in his favor, vesting title in him.

1. Our statute, (W. S. 1372, § 1,) allows a party to testify in his own favor, except when one of the original parties to the contract or cause of action in issue and on trial, is dead or insane, then the other party to such contract or cause of action is not permitted to testify for himself. The plaintiff was no party to the mortgage in which the mistake occurred; and therefore, notwithstanding the mortgagor was dead, he was a competent witness to testify in regard to such mistake. (Looker vs. Davis, 47 Mo., 140.)

2. The doctrine, that a court of equity will correct mistakes in deeds, mortgages, &c., is too well settled to need illustration or citation of authorities. Although this was not a suit to rectify the mortgage deed, it was in effect the same thing. The purpose was the same. It was to vest the title in the plaintiff to the land which he really bought, and which in equity was included in the mortgage.

The mistake that occurred in the mortgage, was continued in the proceedings of foreclosure, all parties to the transaction believing that the real land in controversy was actually purchased by the plaintiff; and in equity it was purchased and paid for by him, and possession thereof taken by him. Under these circumstances the point is, whether a court of equity is not bound to interfere and grant him the desired relief? The settled doctrine is that such interference extends to the

original parties, or those claiming under them in privity; such as personal representatives, heirs, devisees, legatees, assignees, voluntary grantees or judgment creditors, or purchasers from them with notice of the facts." (See Sto. Eq., § 165; Haley vs. Bagley, 37 Mo., 369.)

These parties come within the rule here laid down. The defendants are heirs of the mortgagor, and have no right to resist the interference of the writ; and the plaintiff is assignee of the mortgagee by means of his purchase, and has the right to invoke the aid of a court of equity in his behalf.

In Waldron vs. Letson, 15 N. J. Eq., 126, the facts were almost precisely the same as in this case, and the chancellor in an able opinion, vindicated the doctrine here laid down, and granted the relief.

In Haley vs. Bagley, 37 Mo., 363, the main point was a defect of parties, and the case seems to have turned on this point.

The remark of the learned Judge, that the mortgage was on record and imparted notice, and that the sale was open and notorious, and the purchaser bought at his peril, applies to all such sales. But it does not impugn the doctrine, that, if in fact, a mistake really existed, and was continued throughout the whole proceedings, a *bona fide* purchaser at such sale, would become invested with the equitable title.

The point, whether he was a *bona fide* purchaser, and entitled to the relief sought, would be a question of evidence. The fact that it was a public sale, and that the mortgage was recorded, &c., would not be conclusive evidence against the validity of the equity of the purchaser.

In my opinion, the judgment ought to be affirmed, and in this, Judge Napton concurs.

JULIUS BALKE, Defendant in Error, *vs.* CHAS. SWIFT, Plaintiff in Error.

1. *Fraudulent Conveyances—Personal property—Mortgages—Sale, bill of—Possession.*—In an action for the recovery of specific personal property by A. against D., it appeared that C. mortgaged this property to A., which mortgage was acknowledged and recorded. C. made a bill of sale of the same property to B., which was only intended to be a mortgage. This bill of sale was made after the first mortgage, but before the mortgage was acknowledged or recorded. The bill of sale was not acknowledged. C. remained in possession of the goods, but some months afterwards, and after the mortgage was recorded, B. took possession and sold the property to D. *Held*, that A. was entitled to recover the property from D.

Error to Jackson Circuit Court.

Trefren & Thomson, for plaintiff in error.

Gage & Ladd, for defendant in error.

The bill of sale, not being followed by possession or recorded, was absolutely void as to creditors and subsequent purchasers. (W. S., 281, § 10.)

The certificate of the recorder says the acknowledgment was on the mortgage when it was filed for record, to wit: Aug. 23rd. The date, then, of the acknowledgment is clearly a clerical error.

SHERWOOD, Judge delivered the opinion of the court.

Action for the recovery of specific personal property; petition in usual form.

The defendant, Swift, in his answer, set up a claim to the property in controversy, a billiard table, as the bailee thereof under one G. B. Wood, whom he alleged was the owner, and denied that plaintiff was entitled to recover. The reply was a mere denial of the allegation of the answer. The cause was tried by the court, a jury having been waived, and resulted in a judgment for the plaintiff.

The evidence tended to show that Meredith B. Hedges bought the property of Julius Balke, paid a portion of the purchase money down, and was to execute his notes secured by mortgage on the property for the residue; that he succeed-

ed, however, by urging the necessity of haste in opening his saloon, in obtaining possession of the table, under the promise of executing the note and mortgage, the execution of which was for some time delayed.

The mortgage was executed on the 15th day of July, 1866, but was not delivered to Ensel, the agent of Balke, for some weeks afterwards; but immediately upon such delivery the mortgage was forwarded to Independence to be recorded, which was done on the 23rd of August.

The certificate of acknowledgment it is true, bears date December 5th, 1866, but the certificate of record recites that the mortgage with the acknowledgment thereon, was duly recorded August 23rd, 1866.

I pass this without further comment, regarding it as a mere clerical error, and not as constituting any valid ground of objection to the introduction of the deed in evidence.

It also appears, that Hedges the next day, i. e., the 16th day of July, after he had signed the mortgage, executed and delivered to Wood a bill of sale for the property in question, together with other property, amounting in the aggregate to over $2,000 in value, to secure him for an advancement of $1,055 to Hedges, to enable the latter to furnish the saloon.

No change of possession accompanied the alleged sale, but the place where the table was kept, continued to be known as "Hedges' Saloon."

Nor was the instrument purporting to convey the property to Wood, acknowledged or recorded. This state of things so remained until January or February, 1867, when Wood took possession of the saloon and all of its fixtures, &c., took two of the billiard tables to Kansas and rented the other one, the one in question, to Swift.

The objection was raised by the defendant, that the mortgage deed could not be read in evidence because he claimed a special title in the property adverse to the plaintiff, and such deed was not acknowledged and recorded as required by law. But evidently he under whom the defendant claimed, was in no condition to assert any lack of this particular, as the in-

strument on which he founded his claim had not been either acknowledged or recorded. Nor was there any mutation of the possession of the property. The mortgage was clearly good, as between the parties thereto, without acknowledgment or registry, and although not recorded until after the bill of sale to Wood, yet it was placed on record long prior to the time Wood took possession of the property.

Our statute respecting fraudulent conveyances, (1 W. S., 280, § 5,) provides, that "when any reservation or limitation shall be pretended to have been made of any use of property, by way of condition, reservation, or remainder or otherwise, in goods or chattels, the possession whereof shall have remained in another, the same shall be taken, as to all creditors and purchasers of the person so remaining in possession, to be void, and that the absolute property is with the possession unless such loan, reservation or limitation of use or property, was declared by will or deed in writing proved or acknowledged, and recorded as required by the preceding section."

The evidence shows that the bill of sale, though absolute on its face, was only intended as a mortgage, or reservation of the property therein conveyed, and the statute above cited is precisely applicable therefore, to such a case as the one under discussion.

For these reasons, although error may perhaps have been committed in giving the declarations of law on the part of the plaintiff, yet as the judgment was for the right party, that judgment will, with the concurrence of Judges Vories and Wagner, be affirmed. Judge Adams absent, Judge Napton not sitting.

NELSON M. SMITH, Respondent, *vs.* MOORMAN HAWORTH, *et al*, Appellants.

1. *Statutes, Constitutionality of—Special Judge.*—The Act [Sess. Acts 1870, p. 200, § 15,] authorizing the appointment of a special judge to try a cause, when an application has been made for a change of venue on account of the prejudice, &c., of the judge of the court, is valid. [Harper vs. Jacobs, 51 Mo. 296, affirmed.]
2. *Statutes, Construction of—Special Laws—Departures from General Rules.*—Special laws, that give origin to new and unexpected departures from general rules, should be closely scrutinized, and the powers therein conferred strictly construed.
3. *Courts—Special Judges—Transcript.*—When a cause is tried by a special judge, appointed for that purpose, the transcript should show that the order of appointment was entered of record.

Appeal from Jasper Circuit Court.

Montague & Thomas, for Appellants.

I. The act of the Legislature, (Sess. Acts 1870, p. 200, § 15) to say the least, is of doubtful and dangerous propriety. The transcript fails to show that any record of the appointment of Phelps as Judge *pro tem*, was made.

B. F. Garrison, for Respondent.

Act of Legislature 1870, p. 200, section 14 and 15, together with section 42 same act, authorize the appointment of a Judge, *pro tem*.

Section 14, article 6, Missouri Constitution provides for the election of Judges and their qualifications, which is the same as section 9, article 7, Indiana Constitution. Upon this question the Supreme Court of Indiana seem to have given it a thorough examination, and after a careful compilation of the authorities, they lay down the broad but well settled rule that "Where the constitutionality of a statue is *merely doubtful* it is the duty of the Courts to sustain it." (6 Black. 299; 7 Ind. 326.)

In Indiana the law authorizing the appointment of a Judge *pro tem*, is held to be constitutional. (Starry vs. Winning, 7 Ind., 311; Ketchum vs. N., A. & S. R. R. Co., 7 Ind., 391; 5 Ind., 230.)

SHERWOOD, Judge delivered the opinion of the court.

This was an action brought in the Court of Common Pleas of Jasper county to foreclose a mortgage, and resulted in a judgment as prayed in the petition, and this case comes here on appeal of defendants, who, among other grounds, assign, as error in the action of the court below, the appointment of W. H. Phelps as Judge *pro tem.*, to try the cause. This point was passed upon by this court at its last January term, in the case of Harper vs. Jacobs, et al., in which it was held (Judge Ewing delivering the opinion), that the act of the Legislature, approved February 1, 1870, authorizing such appointment, was clearly within the scope of legislative authority, as a necessary incident of the discretionary power conferred on the Legislature by the Constitution, to establish inferior tribunals from time to time; and, therefore, that the act in question was not obnoxious to the charge of unconstitutionality. Section 15, page 200, laws 1870, of the act referred to, provides, that when an application for a change of venue shall be made because of the prejudice, etc., of the judge of the court, that it shall be lawful for him to appoint, "by an order of record, any duly licensed attorney-at-law of this State Judge *pro tem.* for the trial of the particular cause specified in said order."

An examination of the transcript filed here fails to disclose that any such order was ever *entered of record.* It is a very salutary rule, long sanctioned by reason, experience and authority, that these special laws, that give origin to new and unexpected departures from general rules, should be closely scrutinized, and the powers therein conferred strictly construed. (Schell vs. Leland, 45 Mo. 289.) Applying this rule here an easy and ready solution of the disposition to be made of this case is soon reached.

The entry of record in such a case constitutes at once both the authority of the special judge and the evidence of that authority, without which he is utterly powerless to act. It follows as an inevitable sequence from these premises, that the judgment must be reversed and the cause remanded.

The other Judges, except Judge Adams, absent, concur.

WILLIAM HARRIS *et al.*, Appellants, *vs.* MARY ANN HAYS *et, al.*, Respondents.

1. *Practice, civil—Trials—Evidence, exclusion of—Injury—Reversal.*—When the exclusion of evidence has not injured the appellant, it is no ground for reversal of the judgment.
2. *Practice, civil—Trials—Instructions—Theory of case.*—The refusal of an instruction, based on a different theory from that on which both parties tried the case, is no ground for a reversal.
3. *Wills—Devisavit vel non—Judgment.*—Upon an issue of *devisavit vel non* the final order of the court should establish or reject the will.
4. *Wills—Devisavit vel non—Burden of proof—Circuit Court.—Semble*, that the better practice is, to regard proceedings to establish a will, as proceedings *in rem*, and to require formal proof of the execution of the will from those propounding it, even though it has been already admitted to probate.
5. *Wills—Parties—Witnesses.*—Parties in interest are competent witnesses in proceedings to establish a will.

Appeal from Lafayette Circuit Court.

Wallace & Mitchell, for Appellants.

I. The admissions of the widow, as to her control over, and influence exerted upon deceased in the making of said alleged will, should have been admitted.

II. The burden of proof of the will, is on the propounders of it. (Farrell's Admr. vs. Brennan's Admr., 32 Mo., 333; Tingley vs. Cowgill, 48 Mo., 291; Benoist vs. Murrin, 48 Mo., 48)

In the Circuit Court the will must be probated *de novo* in the "solemn form." (Dickey vs. Malechi, 6 Mo., 177; Benoist vs. Murrin, 48 Mo., 48; Garvin vs. Williams, 50 Mo., 211.)

III. The court was in this cause exercising a branch of probate jurisdiction, and ought by its judgment, to have either set aside the will, or probated it in solemn form. (Benoist vs. Murrin, 48 Mo., 48; Williams Exr. vs. Robinson, 42 Vt. 658; 1st. Amer. Reports, 358.)

Rathbun & Graves, for Respondents.

I. The court will not reverse a judgment on the ground of error in refusing instructions asked, when the instructions

given, fairly present the law. (State vs. Harrold, 38 Mo., 496; Beale vs. Cullum, 31 Mo., 258.)

II. The probating of wills under the statute is a judicial act which is binding upon all the world, until set aside in the mode, and within the time allowed by law. (Jourden vs. Meier, 31 Mo., 40.) And the burden of proof in this suit was on the contestants.

III. The admissions of the widow were properly refused, she being a competent witness.

Having renounced the will, she was merely a nominal party, and her admissions should not be received to the prejudice of other co-defendants. The appellants afterwards introduced her as their own witness.

IV. Although there be error in the proceedings below, the court will not reverse, if upon the whole matter, it appears that the judgment was for the right party. (Dube's Heirs vs. Smith's Heirs, 1 Mo., 313.)

NAPTON, Judge, delivered the opinion of the court.

This was a proceeding under our statute to set aside the will of James W. Harris, on the ground of undue influence over the testator by his second wife and one of his daughters and her husband—the testator being at the date of the will about sixty-four years old, and his body and mind greatly impaired by disease. The petition is made by two of his children, who were cut off by a legacy of five dollars each in the will. There is attached to the petition, a copy of the will, and the probate thereof, upon the testimony of the two subscribing witnesses. The testator had seven children, and leaves his wife and four of his children an equal share of his estate, and to three of his children five dollars, one of whom, (who is a defendant, or not a complainant, in this case,) was provided for by a deed for a tract of land, and the other two are stated in the will to have received from his estate their share. The wife was left $200 over and above her share of a child's part.

There was an answer and replication, and a publication as

to one of the heirs, and after various motions, not important, a trial. The case was submitted to the court.

After hearing the evidence, the court finally entered the following order or decree: "It is ordered by the court that this bill be dismissed, and that plaintiffs go hence, without day; and it is further considered by the court that defendants recover their costs, etc." There was a motion for a new trial; overruled; and an appeal.

The bill of exceptions shows that the plaintiffs opened the case and read the will, but did not read the probate, and then proceeded to examine witnesses to establish the imbecility of the testator, and the undue influence charged.

The contestants of the will offered to prove, by one of the contestants, statements of the widow of said Harris as to the influences she exercised over the testator; but the court excluded the proof, and the plaintiffs afterward introduced her as a witness. An exception was taken to the exclusion of her admissions or declarations.

At the conclusion of the testimony on both sides, the plaintiffs or contestants offered twelve instructions, all of which were refused except one, which is not material. One of the refused instructions is as follows: "On the issue in this case, as to whether the writing produced is the will of deceased, Harris, the defendants, who are endeavoring to establish and hold under the will, affirm that said paper writing is the last will and testament of said deceased, J. W. Harris, and the burden of proof rests on defendants to show the capacity of deceased to make a will at the time propounded will was executed, and also that such paper writing in controversy is the last will and testament of said deceased, duly signed by him or by his direction, and duly attested by subscribing witnesses as required by law; and this, too, independently of and in addition to the probate of such alleged will in the probate court, or before the judge of probate for said Lafayette county, and in addition to the proof upon which such probate was made before said judge of probate." Exception was taken to the refusal of these instructions.

The court then, of its own motion, gave the following instructions or declarations of law:

1. The plaintiffs do not deny the execution of the will, but attack its validity upon the grounds of mental weakness and infirmity, by reason of sickness and old age, and of undue influence exercised over the testator.

The burden of proving these alleged facts is upon the plaintiffs; and unless they have shown from the evidence that such facts, or either of them, so operated upon the testator, that is, that at the time of making the will, the testator was not of sound mind, or that an undue influence was exercised over his weakened intellect at or before the making of the will, whereby he was induced to make such will, then the plaintiffs cannot prevail; and unless the plaintiffs have proved these facts, as above stated, they having assumed the opening and closing of the case, it is immaterial whether the signature of the testator to the will has been proven or not. The will having been probated, and its execution not denied, this fact stands admitted *prima facie*.

2. The court, sitting as a jury, has the right to judge of the credibility of the witnesses; and if the court is satisfied that any witness is not entitled to full credit, from the manner, conduct and appearance of said witness, then it may disregard any or all of such witness' testimony, although unimpeached by other witnesses for truth and veracity.

Exceptions were taken to these instructions. The finding of the court was for the defendants, and the form of the final order or judgment has been stated heretofore.

The decisions of this court in regard to the forms of proceeding in contested will cases under our statute, have not been uniform. In Farrell's Admr. vs. Brannan's Admr., 32 Mo., 332, the court seemed to think there was a difference between a petition to establish a will for the first time, which had been rejected by the probate court, and a proceeding to set aside one already admitted to probate, on the ground of the incapacity of the testator, or undue influence, and concluded that in the last case the formal execution of the will was

admitted, and therefore the burden of proving the testator's incapacity devolved on the contestant. A different opinion had been maintained in Cravens vs. Falconer, 28 Mo., 19; and perhaps in Dickey vs. Malechi, 6 Mo., 177. A recent decision, (Benoist vs. Murrin, 48 Mo., 51,) undoubtedly favors the latter view, and regards the proceedings as in the nature of one *in rem.*, in which there must be, on the part of those propounding the will, a repetition of the formal proofs offered in the probate court, and consequently an assumption of the burden of proof on that side. The proceeding in the circuit court is considered in the nature of an appeal from the probate court, on which the trial is *de novo.*

It will be apparent, from the statement of this case, that the court and the parties proceeded in the trial upon the assumption that the probated will was *prima facie* the will, that its formal execution was admitted, and that the contestants had to establish the allegations of incapacity and undue influence. The contestants opened the case by producing the will, and then proceeded to examine witnesses to establish their allegations of undue influence and mental imbecility of the testator. At the close of this evidence, the defendants introduced witnesses to show the sanity and capacity of the testator, and the absence of improper influence; and among the witnesses were the two subscribing witnesses to the will. There was substantially formal proof of the execution of the will by the attesting witnesses; although, this being supposed to be admitted by the pleadings, no direct questions as to the execution of the will were asked.

The trial being one in which a jury was required, or at least permitted, (Lyne vs. Marcey, 1 Mo., 227; Swann vs. Gilbert, 3 Mo., 187,) and a jury having been waived, the finding of the court on the evidence must be treated here as the verdict of a jury.

But if this court was allowed to examine the evidence as a mere question of preponderance, we think the finding amply sustained. There was really no evidence to show defect of mental capacity on the part of the testator. The contestant's

chief witness, the son of the testator, who was cut off with five dollars, conceded his father's intelligence, at the date of the will, and up to the time of his death. Nor was there any evidence of undue influence by his wife, or his daughter and her husband who lived on the place where the testator died—except the testimony of the wife, which, when considered in connection with all the other evidence, seems an empty boast of influence and control never possessed. The fact that she renounced the will can hardly be reconciled with her claim, that she could have induced the testator to make his will just as she wanted it. The fact also, that this will was a mere copy of a previous one, executed the year before, with the exception of a devise to his daughter, Mrs. Greer, of 40 or 50 acres of land, rendered unnecessary by a deed executed in the interim between the two wills, and a bequest of two hundred dollars to his wife, shows ample time for deliberation on the part of the testator.

This court therefore has no ground for disturbing the verdict of the Circuit Court.

The only questions presented are, whether the court did right in rejecting the proposal to prove admissions or declarations of Mrs. Harris as to her influence over the testator, and the instructions refused and given.

Parties to a suit to establish a will, are now competent witnesses. Whether the ancient doctrine that their admissions were always evidence against them is now abolished, it is not necessary to decide. Mrs. Harris, whose admissions were offered, was subsequently examined and, we may assume, stated everything in court which she had said out of court. The exclusion of Mrs. Harris' admissions or declarations in this case could not have injured the contestants, and therefore is no ground for reversal.

The second question is as to the instructions. We have copied only one of them.

The eleven others are declarations of law conceded to be correct, as applicable to certain varied hypothetical assumptions of fact, and might have been properly given; but the same

principles of law are substantially asserted in the instructions given by the court, with the omission of detailed facts hypothetically stated in the contestant's instructions. The instruction given conceded, that the will must be set aside if the proof was satisfactory, either of mental imbecility, or undue influence. The particular facts, which might conduce to establish this result, were a matter of evidence and not of law.

The refused instruction, which we have copied, is the counterpart of the one given by the court in regard to the form of proceeding, and was properly refused after the case had been conducted throughout on a different theory by both parties. The case was tried on the theory or doctrine maintained in Farrell's Admr. vs. Brennan's Admr., 32 Mo., 332, and although that is not the practice recently approved, the result practically must have been the same under either form of proceeding. The contestants conducted their case on this theory in 32 Mo., but after the evidence was closed on both sides, insisted, by an instruction, on the case being tried differently; the refusal of this instruction is no ground for reversal.

The proper course, doubtless, is for the proponent of the will to introduce the subscribing witnesses, or, in case of their death, proof of their hand-writing, and establish by them the execution of the will and the sanity of the testator. This makes a *prima facie* case, and the burden of establishing incompetence or undue influence rests then on the contestants. In the present case the contestants offered the probated will in evidence, and proceeded to establish the incapacity of the testator, assuming throughout that it was properly signed and attested, and assuming also the burden of establishing incapacity or undue influence.

The decree or final order of the court that, the bill be dismissed, was erroneous, because upon the issue of *devisavit vel non* the court should have established or rejected the will. This decree of dismissal will be reversed, and this court proceeding under the 34th section of the practice act, (W. S., 1068,) will enter a judgment that the paper writing admitted to probate by the Probate Judge of Lafayette county, as the will of

James W. Harris, deceased, was the last will and testament of said James W. Harris.

Judgment reversed, and judgment entered here. The other Judges concur.

STATE OF MISSOURI, *ex rel.*, Attorney General, *vs.* JAMES H. VAIL, Respondent.

1. *Quo Warranto—Information—Attorney General—Private Person—Supreme Court—Jurisdiction.*—This Court has jurisdiction of informations in the nature of quo warranto, whether filed by the Attorney General, or by a private person; though, where other tribunals have been provided for their adjudication, having all the power of this Court (subject to appeal), and more facilities for the trial of issues that may arise, this Court has generally declined the investigation of such cases.
2. *Quo Warranto—Information—Public Offices—Commission from Governor whether Conclusive.*—A Commission from the Governor is not a conclusive defense in an information in the nature of quo warranto for usurping a public office, whether the information be filed by the Attorney General or at the instance of a private party.
3. *Constitution, construction of—Supreme Court—Writs of Habeas Corpus, quo Warranto, &c.—Bill of Rights—Informations for Indictable Offences.*—The provision in the constitution authorizing this Court to issue writs of habeas, corpus, quo warranto, &c., and to hear and determine the same, necessarily assumes, that writs and informations are not criminal informations in the sense of the 14th section of the Bill of Rights, which prohibits criminal informations for indictable offences.
4. *Constitution, construction of—Bill of Rights—Trial by Jury—Habeas Corpus—Quo Warranto—Certiorari.*—The 17th section of the Bill of Rights, declaring the right of trial by jury inviolate, is manifestly applicable to criminal proceedings proper, and cannot be understood to require this Court on habeas corpus, or quo warranto, or certiorari, to summon juries.
5. *Elections—Votes—Secretary of State—County Clerks—Commissions—Governor—Ministerial Acts.*—In opening and casting up the votes at an election the County Clerk, or Secretary of State, has no discretion, and cannot determine upon the legality of the votes, and it is the duty of the Governor to issue the commission in accordance with the result so ascertained All of these officers act ministerially and not judicially.
6. *Elections—Majority Candidates—Disqualifications, not patent—Who Elected.*—The candidate, who at an election receives the greatest number of votes except the successful candidate, is not entitled to the office, when the successful candidate is ineligible owing to personal disqualifications and such as were not patent to the voters.

7. *Quo Warranto—Informations—Public Offices—Elections—Illegal Votes.*—Upon an information in the nature of a quo warranto for usurpation of an elective public office, the qualifications of electors cannot be inquired into.

8. *Quo Warranto—Informations—Attorney General—Public Offices.*—Upon an information in the nature of quo warranto filed by the Attorney General for usurpation of an elective public office, the qualifications of another party not the incumbent, for the office cannot be inquired into.

9. *Quo warranto—Informations—Who can file—What judgment for relator—Statute of Anne.*—Neither in this State, nor under the Statute of Anne, is the relator in an information in the nature of a quo warranto necessarily a claimant for the office, but he must have a special interest in the matter, which interest is a preliminary question for the determination of the court upon his application to file the information; and the court can give no judgment for the relator except so far as costs are concerned; and his title is not necessarily examined into, except so far as it may incidentally or indirectly affect the right of the defendant.

Quo Warranto.

H. Clay Ewing, Attorney General, and John L. Thomas & Bro. and Louis F. Dinning, for Relator.

I. This Court has jurisdiction. (Const., Mo., Art. VI. § III.)

II. This case must proceed by com. law, because in such cases in this State we have only com. law and equitable remedies.

III. A commission issued to a party by the Governor is not conclusive as against the State, complaining through her proper officer. (44 Mo., 223; 45 Mo., 59; 18 Lou., (An.) 517; State vs. McAdoo, 36 Mo., 453; State vs. McBride, 4 Mo., 303; 44 Mo., 229; 44 Mo., 230; 44 Mo., 160; 15 Johns., N. Y., 388; 45 Mo., 59; 36 Mo., 279; 44 Mo., 129.)

In the cases cited by respondent the Court refused to entertain jurisdiction, because it was held that another tribunal, had by statute, exclusive jurisdiction, as to the legality of votes, &c., and not because of the conclusiveness of the commission. (State vs. Garrigues, 28 Penn., (State R.) 9; 35 Penn., (State R.) 263; 44 Penn., (State R.) 332; State vs. Marlow, 15 Ohio, (State R.) 134.)

IV. On an ex-officio information in the nature of Quo Warranto, the Court will look beyond the Commission, and unless the Respondent has been elected, will give judgment of ouster. (People vs. Vail, 20 Wend., 12; 4 Cow., 297; 8 Cow., 102; 4 Wis., 420; State vs. Chandler, 45 Mo., 452, and cases there cited.)

UNIV. OF MICH. LAW LIBRARY

V. An officer derives his title from the election or appointment. (Hunter vs. Chandler, and State vs. Steers, *supra.*)

VI. The commission is at best only *prima facie* evidence of Respondent's right to the office, as already determined by this Court in this case at the February term.

VII. In a proceeding of this kind, the canvass made by the returning officers under our election laws is alone admissible in evidence, not even a mistake in addition can be corrected. (State vs. Garrigues, 28 Penn., (State R.) 9; State vs. Marlow, 15 Ohio, (State R.) 134.)

VII. If when one man, (the defeated candidate) complains, this Court will go behind the commission, certainly when the whole State enters her protest, the Court will go behind the commission. When a party is a candidate, and inelligible to hold the office to which he aspires, and receives a majority of the votes cast for that office, the opposing candidate, who is elligible, cannot oust the inelligible party who is in office;—but the want in elligibility in the office is a matter of public concern, and he can be ousted on an ex-officio information. (56 Penn., 270.)

IX. Where two candidates run for an office, and the one receiving the highest number of votes is inelligible, the party receiving the minority of votes, is not to be returned as elected. (Commonwealth vs. Cluley, 56 Penn.,St., 270; State vs. Giles, 1 Chand., (Wis.) 112; State vs. Swearingen, 12 Geo., 23; State vs. Gastinel, 18 Lou.,(An.) 517; 21 Lou., (An.) 290. Leading cases on contested elections, 144, 300, 305.) If such inelligibility, is of such a character that the voters are bound to take notice of it, it has been held otherwise. (Gulick vs. Newby, 14 Ind., 93.)

X. We have a right in this case, to inquire into all questions of rights of electors, &c., and the fact that the same thing can be done in a contested election, does not estop the inquiry in a quo warranto. (Leading cases in contested elections, 480, 493; 44 Mo., 226.)

XI. Where the persons, on whose right to vote the validity of the defendant's title depends, were at the time of his

LAW LIBRARY OF University of MICHIGAN.

election in the actual possession of the franchise, in virtue of which they voted; at the trial no inquiry can be made into their right, unless an issue has been taken on it. (5 Bac. Ab., 188.)

Leonard, Reynolds & Relfe, for Respondent.

I. There are three writs: First, the old Writ of *Quo Warranto*; a civil proceeding, always without any incidents of a criminal prosecution, instituted in the name of the State, by the Attorney General it is true, and at his suggestion and application, but *not* in the style of "The State at the relation of the Attorney," and not charging that the defendant "has and does now usurp, intrude into, and unlawfully exercise the powers and duties of a public office and trust," (a misdemeanor), but merely requiring him to exhibit his warrant, that is, his commission.

Second: The common law process of an information in the nature of a Quo Warranto, always a criminal procedure holding the defendant to answer by summary process, for a misdemeanor and making him liable to a fine and to ouster from office.

Third: The Statutory process by information in the nature of a *quo warranto* exhibited under the Statute, at the relation of a private person, always a civil procedure in existence solely by statute and only available in the Statutory manner. (State vs. St. Louis Perpetual Marine Ins. Co., 8 Mo., 330; 3 Black., 263; Willcock on Quo Warranto "Information" (Law Library, Vol. 12, p. 247); State vs. Ashley, 1 Ark., 279; Rex vs. Marsden, 3 Burrows, 1817; Tancred on Quo Warranto, 5, 52, 3; Comyn's Digest, "Quo Warranto;" 4 Comyn's Digest "Information;" 4 Black., 312; Bacon's Abridgment "Information;" Cole on Quo Warranto Informations, § 110 (54 Law Library, O. S., 89). The old statutory writ of Quo Warranto exists in this State by force of statute. (W. S. 886.) This court has undoubted authority to "issue here and determine" that writ. (Const. Mo., Art. 6, § 3.)

The English Statutes, reducing informations in the nature of *quo warranto* to a form of action between the parties,

essentially a civil action, are in substance adopted and in existence in this State. (G. S., 1825, § 1, p. 654; W. S. 1133.) In proceedings under these acts, this Court by force of the acts, and of its organic act, has appellate jurisdiction only.

The present proceeding is not one instituted under our Statute; it is not by the Attorney General or Circuit Attorney, at the relation of a private individual. Nor is it the old writ of Quo Warranto, for, in the first place, it is brought, not in the name of the State at the relation of the Attorney General, and in the second place, it specifically charges the defendant with a misdemeanor, for which, if convicted, the punishment must be a fine or imprisonment.

There can be no doubt but that it is, just what this Court has already held it to be, the old common law process, "an information in the nature of a *quo warranto*," always a criminal procedure; in other words, the defendant by this action for an indictable offense is proceeded against criminally by information. (State, *ex rel.*, Vail vs. Clark, 52 Mo., 508.)

II. The usurpation of a public office or trust, being a misdemeanor punishable by fine or imprisonment, is an indictable offense. (W. S., 478, § 24; 516, § 30.)

III. Since the charge is an indictable offense, the respondent cannot be proceeded against criminally by information, but is entitled to a trial by jury. (Const. Mo., Art. 1, § 14; State vs. Ashley, 1 Ark., 279; Bank of Vincennes vs. The State, 1 Blackf., 267.)

IV. When the Constitution of our State, in the "Declaration of Rights," contains a positive inhibitation upon proceedings against a citizen for any indictable offense, other than those named by information, it is very obvious that, when in the 3d Section of the 6th Article it gives this Court power to issue, hear and determine writs of *quo warranto*, it did not intend to include in it a power to issue, hear and determine writs necessarily involving a proceeding against one criminally, for an usurpation of a public office or trust, that having been made indictable.

V. The Respondent was originally in this office, by a commission, the legality of which is not controverted. No one else has been commissioned or qualified as his successor, to whom he could turn over his office, consequently there can be no usurpation on his part, and no vacancy in this office. (W. S., 963.)

VI. The issuing of commissions is confided to the Governor, and no other branch of the Government can interfere. (State vs. The Governor, 39 Mo., 388; State vs. Howard Co. Ct., 41 Mo., 251.)

VII. If the judiciary cannot compel the Executive to issue a commission,or prevent him from doing so in the first instance, they cannot afterwards, at the instance of a subordinate officer of the Executive, and without the intervention of private rights,nullify that commission, indirectly doing that which they have said they cannot do directly.

VIII. The Executive in issuing a commission acts ministerially and politically, and is not answerable to the Courts for his acts; and having acted on a subject within the scope of his constitutional authority, it is to be presumed that his acts are lawful. (State vs. The Governor, 1 Dutcher (N. J.) 348; Gulick vs. New, 14 Ind., 96; Marbury vs. Madison, 1 Cr., 49; Hawkins vs. The Governor, 1 Ark., 570; Exparte Dennett, 32 Maine, 508; Cooley Const., Limit. 41.)

IX. When the respondent shows his commission, issued by the Governor, as Chief Executive of the State, as a justification for his action, it is conclusive upon the state in a proceeding by a subordinate executive officer, instituted for the purpose of ascertaining whether or not he has that authority.

X. The rule which makes a commission *prima facie* evidence, so far as the State is concerned, in drawing salary from the State, certainly will embrace all inquiries by the State. (State vs. Draper, 48 Mo., 213; State vs. Mosely, 34 Mo., 375; State vs. Mosely, 36 Mo., 70; Winston vs. Mosely, 35 Mo.. 146.)

XI. The commission, when issued, must be taken as at

least *prima facie* evidence, that the person holding it is lawfully entitled to the office. (State vs. Howard Co. Ct., 41 Mo., 247; State vs. Pool, 41 Mo., 32; Hunter vs. Chandler, 45 Mo., 452.)

XII. So far as an inquiry by the State is concerned, the action of the Governor in granting the commission is conclusive. No private rights can be inquired into or determined in this procedure. (Hunter vs. Chandler 45 Mo., 452.)

XIII. Our statutes provide two remedies, two procedures for the testing of private rights: the one by a contest, the other by *quo warranto* at the relation of the claimant; this takes away the common law procedure by *quo warranto* at the relation of the Attorney General. The remedy prescribed by the statute must be pursued. (Commonwealth vs. Garrigues, 28 Penn., (St. R.)9; Comm. vs. Baxter, 35 Pa.,263; Comm. vs. Leech, 44 Pa.,332; State vs. Marlow, 15 Ohio, 114; Peck vs. Weddell, 17 Ohio, (State) 271; Lindell vs. H. & St. Joe R. R., 38 Mo., 485; State vs. Stewart, 32 Mo., 385.)

XIV. Votes cast for a candidate, who had not filed the oath required by law, were to be treated as null and void. (State vs. Boal, 46 Mo., 528.)

XV. The respondent in this case *did* receive a majority of the legal votes cast; this too, even if we admit that his opponent was qualified to receive votes.

XVI. The object of this writ is to see who was elected.

Napton, Judge, delivered the opinion of the court.

This is a proceeding by the State through the Attorney General, by way of information in the nature of a *quo waranto.* The information was filed *ex officio*, without leave of the court.

This information recites in substance, that prior to, and at the general election, on the 3rd day of November, 1868, by the Constitution and laws of this State, the office of Judge of the 15th Judicial Circuit was an elective office; that at said election there were two candidates, one of whom was the defendant, and the other one Louis F. Dinning; that Dinning

had all the qualifications required by the Constitution and statutes; that said Dinning received a majority of the votes in said circuit; that the Judges of the various election districts did regularly transmit the poll books to the proper clerks; that the clerks proceeded in due time and form to examine the returns and certified the result to the Secretary of State; that the Secretary of State opened the returns and cast up the votes as required by law; and said Secretary, in accordance with the said returns and the result, calculated and certified that said Dinning received a majority of the votes cast; that this certificate in due form was given to the Governor; but the Governor wrongfully, and without any authority of law, issued a commission to the defendant.

The change in the number of the circuit is mentioned in the information, and explained, but as that matter has already been decided, it is unnecessary to notice it further.

The information charges further, that said commission was illegal; that said defendant has no right to exercise the functions of a judge under it, and prays a judgment of ouster.

The return of the defendant to this information sets up, that said defendant was duly commissioned as judge on the 28th of April 1866; that by virtue of said commission. he entered on the discharge of the duties of said office; that this commission authorized him to perform the functions of said office until his successor was legally elected, commissioned and qualified.

The return further avers, that at the election in November, 1868, he was a candidate, and the only qualified candidate for said office; and proceeds to enumerate his qualifications as to age, residence, taking the reqired oaths, &c.

The return then proceeds to set forth at length, that Dinning, the competitor of defendant. for said office, was under age, had not taken the reqnired oaths, was not a citizen of the United States for five years, nor a qualified voter, and had not taken the oath of loyalty; that he was under thirty years of age; that he had been in armed hostility to the United States. and given aid and comfort to persons engaged in such hostili-

ties and had adhered to the enemies of the United States and sent them money, goods and letters,—that he was a member of the Golden Circle, and Sons of Liberty; that those who voted for him were not qualified electors; and that, notwithstanding said certificate of the Secretary of State unlawfully made, the Governor by virtue of his power under the constitution had given the respondent a commission, that he had decided and determined upon all the facts before him that said Dinning was ineligible and therefore refused to give him a commission, and issued one to the respondent.

A replication was filed by the Attorney General, reasserting the allegation of the petition, and denying various statements in the return.

Upon motion of the Attorney General, all that portion of respondent's answer containing allegations of his qualifications, and allegations of Dinning's disqualifications, by reason of non-age, absence from the State, failure to take the oath, &c., was stricken out at the last term of the court.

An amended return was filed—January Term 1873, setting up, as before, the election and commission in 1866—that the defendant was the only qualified candidate at the election in 1868, and that he was commissioned by the Governor as before stated.

At the same term a plea was filed to the jurisdiction of this court, alleging as grounds:

First—That the court had not granted leave to file said information.

Second—That there is no charge of usurpation of office; nor

Third—No specification of particular acts of usurpation.

Fourth—That the writ is unsupported by affidavit.

Fifth—That the proceeding is a criminal one for an indictable offense, and therefore, as it did not arise in the land or naval force, or in the militia when in actual service, was not within the jurisdiction of the court; that other remedies were provided by statute; that this court had no power to summon juries, and therefore no right to try the case.

This plea was overruled at the present term of this court,

and then the defendant filed his motion for judgment on the pleadings. This motion was based on the ground, that the respondent had been commissioned by the Governor, as the pleadings admitted, and this commission was conclusive in this proceeding by the State for usurpation of office; that the Governor is a co-ordinate and independent branch of the government, and his acts in that capacity not liable to be examined or reviewed by this court; that in this proceeding especially, there is no power to question the Governor's commission, however it may be in informations at the relation of some person claiming the office, or in a contest between parties under legislative provisions; that the executive had a right to go behind the returns in the office of Secretary of State, and to disregard the Secretary's certificate, and therefore the allegations in regard to these returns and certificate are of no importance and entirely nugatory in the trial of this information.

This motion for judgment on the pleadings presents the questions which we consider decisive of this case, and they are:

First.—As to the jurisdiction of this court.

Second—Assuming the jurisdiction to try official informations in the nature of a *quo warranto*, it is then necessary to determine whether the commission of the Governor is conclusive in the case.

Third—Can the Governor, in issuing a commission for an elective office, disregard the returns in the office of the Secretary of State and the certificate of said Secretary, and issue a commission to the person reported by the Secretary as having a minority of the votes in the returns on file in his office.

Fourth—Whether the answer in this case or return requires this court to examine the allegation, that said defendant was elected by reason of the disqualification of his competitor.

Fifth—Whether the allegations in the return, that defendant was elected by a majority of the qualified voters, notwithstanding the certificate of the Secretary of State, requires or authorizes an examination into the qualifications of electors in this proceeding.

Sixth—The validity of the plea of an election and commission in 1866 as a defense in this case.

1. The jurisdiction of this court of informations in the nature of a *quo warranto*, whether filed on the relation of some private person (by leave of the court,) or by the Attorney General *ex officio*, must be regarded as settled. The cases hereinafter cited on the second point are all cases in which the jurisdiction was exercised without question, and the cases, in which the question has been raised, have been determined in the same way. Whether this court will exercise jurisdiction in cases of information on the relation of a private person is another matter, depending somewhat on the discretion of the court, and where the statute has provided other tribunals for their adjudication having all the power of this court, (subject to appeal) and more facilities for the trial of issues that may arise, this court has generally declined the investigation of such cases. (State *ex rel.*, Stewart vs. McIlhaney, 32 Mo., 382; State *ex rel.*, Hequembourg vs. Lawrence, 38 Mo., 535.)

As to the position assumed in the plea to the jurisdiction, that its exercise by the court conflicts with the 14th section of the Bill of Rights prohibiting criminal informations for indictable offenses, it is sufficient to say, that the provision in the constitution giving this court power to issue writs of *habeas corpus*, *quo warranto*, &c., and to hear and determine the same, necessarily assumes that such writs and informations are not criminal informations in the sense of that section. Nor can the 17th section of this bill of rights, which declares the right of trial by jury inviolate, be understood to require this court on *habeas corpus* or *quo warranto*, or *certiorari*, to summon juries; that provision being manifestly applicable to criminal proceedings proper. These informations in *quo warranto*, though originally criminal proceedings, have been long regarded as purely of a civil character, though the power of fine is still given to the court.

2. The next inquiry is, whether in this proceeding the Commision of the Governor is conclusive. That it is not conclusive in informations on the relation of some person claiming

the office is conceded; but it is insisted in the motion for judgment on the pleadings, that in this proceeding by the State through its law officer, this court can look no further than the Commission of the Governor, and that no allegations will be permitted to deny its legality or validity.

This question was before this court as early as 1836, in the case of Judge McBride, (4 Mo., 303.)

That was an information in the nature of a *quo warranto*, filed by the Attorney General *ex officio*, to oust Judge McBride from the office of Circuit Judge. The defendant pleaded a commission of the Governor. The court, however, disregarded the commission, and determined that by the constitutional amendments his office was vacated, notwithstanding his commission.

The case of the State *ex rel.*, Attorney General vs. McAdoo, (36 Mo., 453,) was also a direct proceeding by the State, and the defendant in that case claimed the office by reason of a commission of the Governor under an appointment, and the court held the appointment and commission void, and gave judgment of ouster.

The case of the State *ex rel.* Attorney General vs. Steers, 44 Mo., 225,) was also a direct proceeding by the State through the Attorney General to oust the defendant from the office of sheriff of Ralls county. The defendant set up and relied on a commission by the Governor, issued on a certificate of his election by the clerk of Ralls county. The court gave judgment against the the defendant, notwithstanding his commission, and in the opinion it was observed, (p. 227,) "a person derives his title to an office by his election and not by his commission, and if he holds and exercises the functions of an office without having been legally elected, it is unlawful holding, and he may be ousted at the instance of the State, notwithstanding his commission." There were other points in that case which we will refer to hereafter.

In State *ex rel.* Attorney General vs. Bishop, and State *ex rel.* Attorney General vs. Hays, (44 Mo., 230.) the same doctrine was held.

Apart from these five decisions, which would seem conclusive on this court, no reason is perceived why the Governor's commission should be more efficacious in a proceeding by the State through its official organ in this court, than in a proceeding filed by leave of the court in the name of the Attorney General or Circuit Attorney on the relation of some private person. The question raised by either form of proceeding is, whether the defendant is usurping an office—whether he is exercising functions rightfully or without warrant of law. It is not whether the relator or any one else is *de jure* entitled to it. There are no doubt decisions in some of the States which maintain, that where the relator is the person claiming an office, his right to the office will be examined and determined, thus treating the proceeding as an ordinary action at law between plaintiff and defendant, the relator occupying the position of plaintiff, and of course having on him the burden of proof. But in such cases the departure from the common law rules, and from the practice under the statute of Anne, is so apparent, that it is probable this statute is not in force where such opinions prevail, or if re-enacted, it must be with material modifications. Our statute, which is in most respects a literal copy of the statute of Anne, has adopted the English construction and practice, and authorizes a judgment of ouster and a fine, but only authorizes a judgment for the relator for costs.

Neither here nor under the Statute of Anne is the relator necessarily a claimant of the office alleged to be usurped by the defendant. The information is filed by the proper officer "at the relation of any person desiring to prosecute the same;" whether the relator is a proper person and will be allowed to file such a proceeding is a preliminary enquiry, for the Court, and on that inquiry, whether made before or after the information is filed, the Court will ascertain what interest the relator has in the information. It is well settled in England, that the relator, though not necessarily a claimant of the office, must have a special interest in the matter of enquiry. Tancred in his work on this subject states the English rule thus:

"Where a person is a perfect stranger to a corporation, though his situation may not absolutely disqualify him from the right to examine into the title of a corporation, yet, as Lord Kenyon observed, he ought to come with a very fair case in his hands.

But a slight interest will obviate this objection; for where the relator appeared to be an inhabitant of Harborough, and by charter the government of the town and all the people therein was vested in the mayor and chief burgesses, the court thought that the clause gave the relator a sufficient interest to entitle him to an information questioning the right of the defendant to the place of a chief burgess." (Tancred. p. 45.)

From this it seems that great liberality prevailed in England in the construction of the statute of Anne, and the cases there are numerous, in which a mere stockholder is allowed to be relator in an information against a director or other officer, although the stockholder asserts no claim to the office himself.

However this might be, the cases of information on the relation of private persons are numerous in this court, and in no instance, so far as we have observed, has it been determined that the Governor's commission is conclusive.

As the officer derives his title from the election, and the commission is merely evidence of his election, it must necessarily be regarded as only *prima facie* evidence, unless the Executive is exclusively vested with the power to determine upon the results of elections.

Now in informations on the relatio: of a person claiming the office, the Court can give no judgement for the relator except so far as costs are concerned, and the relator's title is not necessarily examined into, except so far as it may incidentally or indirectly affect the right of defendant, and this being the rule in regard to such informations, *a fortiori* it must be the rule in a proceeding where there is no relator, and which is instituted as a matter of right by the State. To hold otherwise in either class of informations would be to

sanction a disregard of the constitution by the Executive in respect to elective officers, and leave the party injured without means of redress.

Third—The next question to be examined is the right of the Governor to set aside the returns in the office of the Secretary of State, and the certificate of this officer conforming to the returns,and to give the commission to the candidate appearing from these returns and certificate to have received the smaller number of votes, on the ground that the candidate elected was disqualified, or that he received votes of disqualified electors.

This question is an important one, in view of the result of a decision either way, not merely as the rights of parties in this case may be involved, but as it may affect a proper construction of the constitutional power of the different departments of the State Government.

The question in this case is not, whether the Governor may go behind the certificate of the Secretary of State and look into the returns filed in that office to see if the certificate is warranted by these returns, or is false, but whether he can disregard both the certificates and the returns on file in the Secretary's office, and give the commission to the candidate appearing to have the minority vote, upon the ground, that the candidate having the majority of votes is personally disqualified or received a sufficient number of the votes of electors who were disqualified from voting.

The Governor, under our Constitution and laws, is an executive officer, not a judicial one. He is provided with no means of investigating questions of fact. In the matter of elective officers he is simply authorized to issue commissions. (Const., Art. 5, § 25; Stat., p. 570, § 32.)

It could hardly be maintained, that upon an *ex parte* affidavit or statement he would be warranted to disregard official returns, yet he has no means of resorting to any other kind of evidence. He is relieved of all responsibility by issuing a commission to the person who appears on the records filed at the seat of government to be entitled to it. Though

these records may not be conclusive in investigations in either contested elections or judicial proceedings, the Governor at least is concluded by them, for he has no means of ascertaining their truth or falsity. His official duties in this matter are purely ministerial This is the rule as established by the decisions of this Court, in regard to all ministerial officers. (State, ex rel., Bland *vs.* Rodman. 43 Mo., 257.)

It applies to the Secretary of the State, and to the clerks of the counties, in the exercise of the functions respectively confided to them in regard to elections. "The law" say the Court, in State *vs.* Rodman, (43d Mo. R.) "does not seem to have invested in the Secretary, any discretion in the premises. It requires him to perform the act of opening and counting the returns. It is the law declared by this Court as well as by the general current of authority, that a County Clerk, or the Secretary of State, in opening and casting up votes, acts ministerially and not judicially. The matter of determining upon the legality of votes is a judicial function, to be passed upon before a tribunal competent to make an adjudication where the parties interested may be heard."

The same point was so held in State, ex rel., Attorney General *vs.* Steers, 44th Mo., p. 223. There it is said, in reference to the return of the Clerk of Ralls County:

"If the clerk has sufficient mathematical ability to correctly count up returns, he is perfectly qualified for his office, for that is the only duty devolved on him by law.

To determine upon the legality of votes is a judicial proceeding before a court competent to hear and adjudicate, where the parties interested can appear and present their respective claims.

To allow a ministerial officer arbitrarily to reject returns at his mere caprice or pleasure, is to infringe or destroy the rights of parties, without notice or opportunity to be heard—a thing which the law abhors and prohibts. Admit the power, and there will be no uniformity. One convassing officer will reject for one thing, and another for a different matter, and no man can tell whether he is legally elected to

an office, until he consults the notions of a canvasser. The exercise of such a power is subversive of the rights of the citizen, and dangerous and fatal to the elective franchise. But it is enough to say that the claim is utterly unauthorized. The law has provided tribunals with ample power to hear and determine all questions pertaining to elections, and pass upon the validity of votes, where the parties interested can appear and have a fair trial upon pleadings and proofs.

When a ministerial officer leaves his proper sphere and attempts to exercise judicial functions, he is exceeeding the limits of the law and guilty of usurpation."

This language is strong, but we think the conclusion is right, and the reasoning is as applicable to the Governor acting in a ministerial capacity as to the Secretary of State, or the clerks of the counties, or any other officer entrusted by law with the duty of canvassing and counting up returns of an election. The Governor, although the chief executive of the State, and entrusted in many cases with the power of appointment, yet where he issues a commission for an elective office is simply performing a ministerial duty in which he must necessarily be governed by the returns, as they appear in the proper office at the seat of Government, or by the certificate of the officer who receives and opens the returns. He has no means of ascertaining, whether illegal votes have been given, or whether opposing candidates are disqualified. These matters, and others of a like character, may be inquired into elsewhere, and ample provision is made by law for this purpose.

In opposition to this view we have been referred to the case of State, ex rel., Bartley vs. the Governor, 39 Mo. 392. That was an application to this Court for a mandamus on the Governor, requiring him to issue a commission to the relator in the case, who claimed to be elected Judge of the County Court of Callaway county. The mandamus was refused on the ground that this was an executive function entrusted by the constitution to a co-ordinate branch of the government, and that it was not in the province of the judi-

ciary to interfere. Whilst there are observations made by the Judge who delivered the opinion of the Court in that case, which may seem inconsistent with the positions assumed now, and in regard to which I do not express any opinion for myself or others, it is obvious that the decision does not touch the question now under consideration, and that the remarks of the Judge are to be understood in connection with the question raised and discussed in that case. This is not an application for a mandamus. The Governor has acted—has issued a commission, and the only question is as to the validity of this commission.

The Governor is entrusted by the constitution with authority to issue commissions to all officers elected or appointed—Art. 5, § 25. That neither this Court nor any other branch of the judiciary can interfere with the exercise of a purely political power, confided by the constitution to the Executive, is clear. Whether the issuing of commissions to elective officers, is one of those political functions which the judiciary cannot compel the Governor to perform, it is not important in this case to inquire, but that the Governor, in the performance of this function, must be controlled by the laws regulating elections, and by the evidence furnished him under those laws, and cannot institute inquiries into facts outside of the records in the public offices is, in our opinion, the necessary result of the purely ministerial character of the act. The act is purely ministerial, although confided to the Governor in his political capacity. Any other construction would open the way to endless abuses, and tend to destroy the elective franchise. The people of the State have declared certain offices, and among them judicial offices, elective, and the Constitution and laws have provided the mode and manner of conducting elections and ascertaining their result.

If the clerks falsify the returns, or if illegal votes are cast, or ineligible candidates get a majority of votes, ample means are provided to correct the errors or frauds through judicial investigations, before tribunals appointed for that purpose. The Executive has no such judicial machinery furnished him

—no means of trying facts—and his information must be *ex parte.*

Whether he assumes to have personal knowledge of the disqualifications alleged, or the illegality of votes, or relies on the statements of others, the person returned as elected has no notice, and can have none, and therefore no opportunity of being heard in his case; in short, the issue of a commission to an elective officer is a ministerial act, though confided by the constitution to the Governer in his political capacity.

Fourth—But it is said in this case, that although the Governor had no right to disregard the official returns in the office of the Secretary of State, and issue a commission to the defendant, whom these returns showed not to be elected, yet that this court will now investigate the question of the eligibility of the opposing candidate; and, upon ascertaining that he was disqualified, will therefore conclude that by a sort of a *post liminium* rule the commission was, as it turns out, rightly issued, it being conceded that on *quo warranto* the court may, although a Governor cannot, go behind the certificate of the Secretary.

There are several objections to this position, either of which we think sufficient.

In this proceeding by the State, the eligibility of Dinning (who received the highest vote) is not in question, unless we assume that votes cast for an ineligible candidate are void, and of no effect, and that the qualified candidate is elected, whatever may be the majority against him. It is said, that opinions to this effect are entertained and asserted by writers on constitutional law, but we have been referred to no judicial decision to this effect.

In Gulick *vs.* New (14 Ind., 102) it was held, that where the voters were legally bound to know that a candidate was ineligible, the votes cast for such candidate count for naught, and the case is one of a judge being voted for to fill an office, which by the constitution a judicial officer was not allowed to hold.

But in the case in Indiana it is conceded, that where the

candidate receiving the highest number of votes is ineligible by reason of a cause which the voters were not bound to know, such as non-age, non-residence, want of naturalization, &c., the result is a failure to elect.

In the State of Wisconsin vs.Giles (1 Chand. 112) the court were of opinion that "the mere ineligibility of a candidate does not render void the vote cast for him; that such vote should be counted, and that in the event of such ineligible person having the highest number of votes, the person having the next highest number is not thereby elected." This opinion was reiterated by the same court in State vs. Smith (14 Wis. 498.)

In Commonwealth vs. Cluly, 56 Pa. (State R.) 270, it was held, that the votes cast at an election for a disqualified candidate were not nullities. Judge Strong, who delivered the opinion of the court, says: "Even in England it has been held that votes for a disqualified person are not lost or thrown away so as to justify the presiding officers in returning, as elected, another candidate having a less number of votes, and if they do so, a *quo warranto* information will be granted against the person so declared to be elected, on his accepting the office. Under constitutions such as ours are, there is even greater reason for holding that a minority candidate is not entitled to the office, if he who received the highest number of votes is disqualified." In State *ex rel.* Stone vs. Garland, 18 Lou. 517, and 20 Lou. 114, the same opinion is expressed. The other American authorities seem to be to the same effect. (13 Cal. 152; 25 Maine 568, referred to in 38 Maine appendix, opinion of the Judges; 12 Ga. 23; see Dillon on Municipal Corporation, 176, § 135.)

In England the general principle is stated thus by Tancred:

"The general rule upon this subject is, that where a person proposed as a candidate is unqualified, votes given to him after the discovery and notice of his want of qualification are thrown away, and that the candidate who, next to the person disqualified, has the greatest number of good votes, is to be considered as duly elected." This seems to favor the view of

the Indiana Court in the case of Gulick vs. New; that such disqualifications as are merely personal, and not patent to the voters, such as that the candidate is not of age,has not resided the requisite time in the State or district, is not a naturalized citizen, or is a member of some secret society disaffected to the Government, or had been engaged in hostility to it, would not have the effect of electing the minority candidate; and such conclusion would appear to conform to our system of elections. To declare a candidate for an elective office elected, who has received but few votes, on the ground that his competitor,who received perhaps twice as many, was disqualified, would not accomplish the will of the electors. The object of an election is to ascertain the choice of the majority. If a disqualified candidate receives a thousand votes and his competitor only a hundred, to pronounce the latter elected is not in accordance with any ascertained will of the electors, unless it may be inferred that the votes for the disqualified candidate were cast with a knowledge of his inability to take the office—an inference which could not be drawn where the disqualifications are such as are enumerated in the pleadings in this case.

It is unnecessary to determine whether it would be the rule, in any case of disqualifications whether patent or latent.

5th. The next inquiry is the allegation in the return or answer, that the defendant was elected by a majority of the qualified voters. The court might pass over the plea as evasive and equivocal, but conceding it to be an indirect assertion that the defendant was elected by reason of the number of illegal votes cast for his competitor, the question is presented, whether the court will in this proceeding undertake to examine the truth of this allegation. In our opinion, we have no such power, for,

First—This is not a proceeding against Dinning, who is alleged to have received illegal votes, nor is Dinning the relator claiming the office, nor are his rights in any way to be determined in this case. He is not *de facto* Judge, nor can we assume that he will be in any result of this proceeding. He has no commission, and if the Governor declines to com-

mission him, according to the decision in the case of Bartley (39 Mo. R. 392,) this court has no power to control the Governor's action.

Secondly—This court in the present information has no concern with, nor power to inquire into, the qualifications of electors. Had the proceedings been directly on the relation of Dinning, the same principle would obtain.

The English law on this subject cannot be, of course, entirely applicable here, but the leading principle governing the courts there may be adopted as a safe guide in determining similar questions here. Tancred states in his treatise on this subject in regard to proceedings on informations in the nature of a *quo warranto* on the relation of a private person, that "where there is no method of prosecution by which the title of electors may be questioned in the first instance, their validity may be inquired into from the necessity of the case, upon an information against a person elected by them."

In Symmers and others vs. Reg. (Cowp. 489,) Lord Mansfield observed: "Whether on the trial of the respective rights of the several defendants, the elected, the rights of the voters to their corporate franchises can be gone into without any notice, either on the record or collaterally, has never been settled, though it has been touched upon in several cases, and it was only settled that no corporator was bound by surprise to go into the original qualifications of any corporator in possession, who voted for him at his election, especially without notice." In this case Mr. Buller, of counsel, conceded that a latent objection to the qualifications of electors could not be examined, but insisted that where the elector, who was a burgess or councilman, had been himself ousted by *quo warranto*, the record of such ouster was evidence in that case, although the defendant was no party to that suit, because of the public notoriety. But Lord Mansfield said: "The next, which is an objection of less difficulty, is that the Judge below has refused to go into the qualification and capacity of several freemen and common council-men who offered their votes. Let us state the objection as it is put and examine it. The proposi-

tion is, that the Judge, on the information, should have done exactly what he ought to have done if the title of these persons, who were common councilmen *de facto*, had actually been in question before him on *quo warranto*. They were *defacto* members of the corporation, admitted, sworn, and in the actual enjoyment of the office. The question is, whether the judge, collaterally at the trial, ought to have gone into the validity of these men's titles. Could the mayor have gone in to it at the election? I am very clear he could not. There are modes sufficiently open to the partiality of returning officers, without adding more. Where the qualification is to be judged of by him, it cannot be avoided.

"In cases of elections in the city of London, certain qualifications are required at the polls, therefore it must be seen that in some degree the candidates have these qualifications. So where an election is to be tried, which may involve many other rights. But where the right of election is in freemen, in their corporate description, whether they were duly chosen is not to be tried at the election of a third person, but they must be properly ousted." See also Rex. vs. Mein, 3 Term R., 596; Rex. vs. Latham, 3 Burr. 1485.

The result of the English decisions is, that where the right of electors who were such by reason of their filling certain corporate offices is questioned, it cannot be done collaterally in an inquiry into the title of the person elected, but must be done in a direct proceeding against such elector; but where the electors are not so by reason of filling corporate offices, but merely as citizen voters, such an inquiry is legitimate in an information against the person elected, where there is no other mode provided for their examination. (Tancred, p. 199.)

Now, the election law in this state affords ample means of contesting elections on the ground of the illegality of votes cast; but a notice is required, and a specification of the names of all the voters objected to (1 W. S., p. 573, § 54). If it be admitted that this inquiry into the qualifications of voters is still open in a proceeding in *quo warranto*, still the court

would certainly require, what the statute requires in contested elections—a previous notification and a complete list of the voters whose qualifications are meant to be disputed. The plea in this case simply is, that the defendant received a majority of legal votes and is only by implication an allegation, that illegal votes were cast in favor of his competitor, and contains no specifications of the number or names of such alleged illegal voters, and gives no opportunity to the opposite party, had there been any in the case, to prepare testimony on this point. But had the plea been more specific, the same conclusion in the proceeding would have been reached for the reasons heretofore indicated.

6. There is another point made in the return which it is proper to notice. The defendant sets up a commission in 1866, and avers that he holds over under that commission, as no successor has been elected, commissioned and qualified. This is disposed of by reference to the case of Steers (44 Mo. R. 226), where a similar plea was filed and disposed of in these words: "The evasive answer, that no successor to the defendant had ever been qualified, is full of duplicity, and may be construed to mean, that he holds under either election no other person having succeeded him in the office. The allegation in the information is a plain, simple one, requiring a denial, which the defendant has not seen proper to make. * * * It is true that by force of existing law the officer holds over until his successor is elected and qualified; but if by unlawfully detaining his certificate and commission, he prevents the person legally entitled thereto from qualifying, he will not be allowed to set up this as a defense and reap a benefit from his own wrong."

The importance of this case, affecting the elective franchise generally, and particularly the rights of the people of the circuit and of the defendant, has induced a careful examination of all the points presented, although, perhaps, some of them were not essential to the conclusion reached. These conclusions have already been stated and may be substantially repeated in a few words.

We are of the opinion that the court has jurisdiction of the information filed, and that the commission of the Governor is not conclusive on the trial, and that the returns and certificate of the Secretary of State made in conformity to the thirty-second section of the law concerning elections (1 Wagner, p. 570) are conclusive on the Governor; that he cannot judicially inquire into the qualifications of candidates; that he is furnished by law with no means of prosecuting such inquiries, and therefore the Constitution did not, in requiring him to issue commissions to elective officers who had the highest number of votes, authorize him to inquire into facts of which the records in the public offices could give him no information. That the commission to the defendant being admitted by the pleadings to have been issued without regard to, and against the returns on file in the office of the Secretary of State, and without regard to the certificate of said Secretary, which was in conformity to the returns, is not a valid title to said office of Judge of the 26th Circuit.

We are further of opinion, that the alleged ineligibility of Dinning, who is not a party to the proceeding, did not authorize a commission to defendant, who received a less number of votes; and that this court can not in this proceeding and under the pleadings inquire into the qualifications or disqualifications of Dinning, who received a larger number of votes than defendant.

We shall order a judgment of ouster to be entered. The other Judges concur.

BENNETT C. BROWN *et al.*, Plaintiffs in Error *vs.* THOMAS SCHACKELFORD, Defendant in Error, Ex'r of S. HUTCHINSON.

1. *Partners—Joint funds—Speculation by one.*—Generally one partner cannot speculate with the partnership funds for his individual benefit.
2. *Partners—Joint funds—Speculation by one—Damages.*—A. B. & C. shipped goods jointly from America to D. in England to sell for them. A. on his private account drew a bill of exchange on D., but this action did not cause nor affect the sale of the property. D. sold this bill of exchange, there being at the time a great difference in price between gold and U. S. Treasury notes. A. invested the money so realized and lost by his investments. D. in settling with the partners, charged them interest for the money advanced to A. on account of the bill of exchange. *Held*, that this interest in gold was the amount due from A. to the other partners.

Error to Howard Circuit Court.

A. J. Herndon, and Lay & Belch, for Plaintiffs in Error.

Thomas Schackelford, for Defendant in Error.

WAGNER, Judge, delivered the opinion of the court.

This case was submitted to the court for determination upon an agreed statement of facts, by which it appears, that B. C. Brown, A. W. Morrison, John L. Morrison, the plaintiffs, and one E. B. Butler, were engaged as partners in putting up tobacco in Howard County, Missouri, and shipping the same to a foreign market for sale. The tobacco was sent to England for sale, and remained unsold in the hands of a commission merchant there. It was agreed between the partners, that the tobacco should not be sold without their joint consent, and that it should not be drawn against by either partner, so that a forced sale should not take place by reason of such draft.

Butler, afterwards, without the consent of the other partners, drew a draft on the commission merchant in England, but gave a responsible endorser on the bill, with the understanding that the drawing of the bill should not force the tobacco on the market.

The bill was sold when the difference between gold and legal tender was very large.

The proceeds were invested by Butler in other tobacco, and he suffered a large loss in consequence.

It is admitted, that the tobacco was not sold in England by reason of the bill having been drawn, but that it was afterwards sold under the direction of all the partners. It is also admitted, that, if the bill had not been drawn, the profits on the tobacco would still have been the same to the partners.

Hutchinson, since deceased, became the purchaser of the interest of Butler in the tobacco, and the question between the parties is, as to whether Hutchinson, as assignee of Butler, shall be charged with the difference between gold and treasury notes at the time the bill was drawn, or be charged with merely the interest in gold.

The court below held, that defendant was not liable for the difference between gold and treasury notes, but was chargable with interest only.

It is generally true in partnership transactions, that one partner cannot speculate with the partnership funds for his own individual benefit. And if either of the partners have violated the terms of thepartnership contract, and have abused the trust with which as a partner he was clothed, and have partnership assets that he has not accounted for, he will be liable in an appropriate proceeding.

If a partner without the consent of the firm withdraws a portion of the assets, and invests in a new or different enterprise, he may be compelled to account to the other partners for a proportionate share of the profits.

The agreed case admits that the sale of the tobacco was not hastened by Butler's drawing the bill, and therefore that act had no influence on its sale.

Had the bill not been drawn, as was the agreement, then all that was received from the commission merchant would have been equally divided between the partners.

As the commission merchant charged interest on the advance made to Butler, and this was deducted from the amount received on the sale of the tobacco, this interest would constitute the measure of damages, which Butler should pay to the other partners.

If Butler is to be held liable for drawing the bill as on a

partnership transaction, then his investment of the proceeds must partake of the same character, and as he realized no profits there can be nothing due to the other partners.

It is not pretended that the partnership suffered any loss in consequence of Butler's drawing the bill, The other partners' status was not in the least changed.

The tobacco was not sold till they gave their joint order for its sale, and they received each his proportionate share of the proceeds.

Butler made nothing out of the transaction, and I am unable to perceive any just rule on which the plaintiffs can base their claim.

The judgment should be affirmed. The other judges concur.

THE STATE OF MISSOURI, Appellant, *vs.* JOSEPH CASTEEL, *et al.*, Respondents.

1. *Practice, criminal—Indictment—Grand Larceny—Allegations—Unknown owner.*—An indictment for grand larceny may charge that the property stolen belonged to a person unknown to the jurors.
2. *Practice, criminal—Indictment—Larceny—Strays—Posting.*—A stray may be the subject of larceny before it is posted.
3. *Practice, Criminal—Statute, construction of—Indictment—Grand Larceny—Essential averments.*—In an indictment for grand larceny, at common law and under W. S. 456, § 25, the words "feloniously" and "stole" are essential averments.
4. *Practice, criminal—Statute, construction of—Indictment—Larceny—Averments.*—In an indictment for larceny of a stray under W. S. 461, § 46, it may not be necessary to use the word "steal," as it is not used in the description of the offense in the statute.

Appeal from the Camden Circuit Court.

H. Clay Ewing, Attorney General, for Appellant.

An estray is the subject of larceny. (State vs. Martin, 28 Mo. 530.)

A. D. Mathews, for respondent.

I. This indictment is not drawn under W. S. 461, § 46, and is bad under W. S. 460, § 45.

II. It is not good as an indictment for simple larceny, because all the material allegations are stated argumentatively. (Bish. Cr. Pr., § 269.)

ADAMS, Judge, delivered the opinion of the court.

This was an indictment for grand larceny. The language of the indictment charging the offense is as follows: "That Joseph Casteel and David B. Casteel, both late of said county, on the 5th day of January, in the year 1870, at the county of Camden aforesaid, did feloniously and wilfully take and convert to their own use a certain stray steer, of the value of fifty dollars, the property of some person to the jurors unknown. They, the said Joseph Casteel, Sr., and David B. Casteel, at the time of such felonious conversion not having posted said stray steer, wherefore, by virtue of the statute in such case made and provided, the jurors aforesaid upon their oath do say, that the said Joseph Casteel, Sr., and David B. Casteel, did feloniously steal, take and carry away the said steer, the property of some person to the jurors unknown, against the peace and dignity of the State."

The defendants filed a motion to quash the indictment, alleging two grounds of objection—First. That they are charged as converting to their own use a stray that had never been posted — and second, that the offense is argumentatively charged in the indictment.

The court sustained this motion, and quashed the indictment, and the circuit attorney has brought the case here by appeal.

1. The first ground of objection to the indictment is not tenable. A stray may be the subject of larceny before it is posted. So a party may be guilty of stealing goods and chattels of an unknown person, and it may be so charged in the indictment. (5 Bac. Ab. Index G. p. 316; 2 East. P. C., 651, 781; 1 Chitty's Crim. Law, 212; State vs. Martin, 28 Mo., 530.)

2. Grand larceny consists of "feloniously stealing, taking and carrying away," money, goods, &c., of the value of two dollars or more, or any cattle &c., belonging to another. (1 W. S. 456, § 25.)

At common law it was essential in charging this offense to use the words "feloniously" and "stole," in order to fix the party with a criminal intention. Without these words a *trespass* would be charged. (1 Chitty's Crim. Law, 949.) Our statute uses the same words in describing the offense. This indictment does not use these essential words in charging the offense. They are only used by way of corollary, and not as a positive charge of larceny.

Section 46, (W. S. 461,) provides, that "every person who shall convert to his own use, or make way with, or secrete with intent to convert to his own use, a stray of any kind belonging to another, before the expiration of a year, next after the posting of such stray, shall be guilty of grand larceny, &c."

In framing an indictment under this section, it might not be necessary to use the word steal, as it is not used in the description of the offense in the statute. But evidently this indictment could not have been found under this section, as on its face it appears the animal had not been posted. This indictment in my opinion is bad, and the motion to quash is properly sustained.

Judgment affirmed. The other Judges concur.

THE STATE OF MISSOURI, *ex rel.*, T. C. NESBITT, Respondent, *vs.* THE BOARD OF EDUCATION OF APPLETON CITY, Appellants.

1. *Statute, construction of—School districts—Towns—Territory outside of corporate limits attached.*—Territory outside of town limits may be taken in and attached for school purposes. [W. S. 1262, §1]

Appeal from St. Clair Circuit Court.

Henry Flanagan, with Ferguson & Clark, for Appellants, relied upon, Fort Dodge School District, vs. Dist. Township Wahkansa, 15 Iowa, 434; Ind. School District of Granville vs. Supervisors, 25 Iowa, 305; Cist vs. State, 21 Ohio St., 339.

Smith & Johnson, for Respondents.

The law of 1870 only authorized: Any City, town, or village, the plat, &c., together with the territory attached, &c., to be organized into, and established as a single school district, but did not authorize inhabitants of said town, or any part of them, to include under said organization neighboring territory not before attached thereto. (State vs. Searl, 50 Mo., 268.)

WAGNER, Judge delivered the opinion of the court.

Judgment was given for the plaintiff in the court below, upon demurrer, and the only question in the case is, whether certain proceedings, by which territory outside of the town limits was attached to Appleton City for school purposes, were regular and legal.

At an election held for that purpose in pursuance of notice, the town, with other territory lying out of the corporate limits, was organized and established as a separate school district under the provisions of the statute. (W. S. 1262, § 1.)

The voters of the town, and also those inhabiting the outside district, participated in the election on the adoption of the law, and in the choice and selection of trustees; but it is now insisted that there was no authority for attaching or annexing any territory not included within the corporate limits. The statute above referred to declares that "any city, town

or village, the plat of which has previously been duly filed and recorded in the Recorder's office of the county wherein the same is situate, together with the territory attached, or which shall hereafter be attached, to any such city, town or village for school purposes, may be organized into, and established as a single school district." It would seem obvious enough from the reading of this statute, that it was not intended to confine the land to the territory attached to the town in its corporate capacity. The language is, "the territory attached, or which shall be hereafter be attached to any city, town or village, for school purposes."

This clearly contemplates, that territory outside of the town limits may be taken in and attached for school purposes, as convenience may require, whenever the people interested may so desire. It then becomes dis-annexed from the former school district, and constitutes attached territory in the sense of the law.

I therefore think the Circuit Court erred, and its judgment must be be reversed and the cause remanded. The other Judges concur.

STATE OF MISSOURI, *ex rel.* STONE, Respondent, *vs.* THE COUNTY COURT OF VERNON COUNTY, Appellant.

1. *Statutes, construction of—Organization of counties into municipal townships. —Acts of March 18, 1872, and March 24, 1873.*—The act of March 24, 1873, was not designed to interrupt the continuity of the act of March 18, 1872, so as to avoid or annul proceedings under it. The act of 1873 must be construed as a continuation of the act of 1872, both relating to the organization of counties into municipal corporations, the former being designed to correct supposed defects in the latter.
2. *Statutes, construction of—Repeal—Acts done under.*—Acts done under a law are not rendered nugatory by the repeal of that law. [W. S. 895, § 5.]
3. *Statutes, construction of—Laws inconsistent—Repeal of,*—The general rule is *leges posteriores priores contrarias abrogant*, but it has limitations.

Appeal from Vernon Circuit Court.

Wight, Jackson & Burton, for Appellant.

I. The act of 1873 is not amendatory of, but repeals the act of 1872 by the most emphatic language. The court cannot construe a law that can only have one manifest meaning. (Sedg. Stat. Law, 121.) There is no question here of repeal by implication. (Newkirk vs. Chapman, 17 Ill., 344.)

II. A subsequent statute, revising the whole subject of a former one, and intended as a substitute for it, although it contains no express words to that effect, operates as a repeal of the former. (Mich. Canal vs. City of Chicago, 14 Ill., 336; Bartlett vs. King, 12 Mass., 537; Nichols vs. Squire, 5 Pick., 168.)

III. After the repeal of the law, there could undoubtedly be no election of officers under that law, and the new law must be looked to for a full organization. (Sedg. Stat. Law, 129, 130; Pot. Dwar. Stat., 160.)

Johnson & Buller, and Thos. Van Swearingen, for Respondent.

I. Though the act of 1873 purports to repeal that of 1872, it is in reality merely a revision thereof, embodying the same principles, and to a great extent literally re-enacting its provisions. Sections 1, 2, and 3 of Article 1 of both acts are precisely the same, and section 4 of Article 1 is substantially so.

These sections are the only ones which make provision for the adoption of the act, and when found in the new statute, must be construed as continuations of the old, and not as new enactments. (State vs. Fiala, 49 Mo., 319; St. Louis vs. Alexander, 23 Mo., 483; Mullen vs. Guest, 6 Texas, 275; W. S. 897, § 5, 3rd Ed.]

II. In construing a statute, the intention of the Legislature is always to be sought, and, when manifestly ascertained, will often control the strict letter of the law, and it will not be presumed, that the Legislature intended to do an unreasonable thing unless such intention is indicated in express terms so as to be unavoidable. [Neenan vs. Smith, 50 Mo., 525; State

vs. King, 44 Mo, 283; Ryegate vs. Wardsboro, 30 Ver., 746; Sedg. Const. Lim., 124.]

III. The title of the act of 1873 also shows that it was merely intended as a revision of the former law. In this country, the title of an act is one of the guides to its interpretation. [Const. Mo. Art. 4, § 31; Smith's Const. Constr'n., § 643.]

IV. The repeal of the statute of 1872 would not affect any thing which was already done and completed, nor any right which was acquired under the old law. (Smith's Const. Constr, § 759; W. S. 894, 895, §§ 3, 5.)

WAGNER, Judge, delivered the opinion of the court.

This was a proceeding by mandamus, instituted in the Circuit Court of of Vernon county, to compel the County Court of that county to district the county into four compact districts for the purpose of electing justices to constitute the future County Court, and to order an election therefor. A peremptory writ was ordered, and the defendants appealed the case to this court.

From the pleadings and exhibits it appears, that under the provisions of the act entitled, "an act to provide for the organization of counties into municipal townships, and to further provide for the local government thereof," approved, March 18, 1872, a proper petition was presented to the County Court, and an order made submitting to the qualified voters of Vernon county, at the general election in November, 1872, the question whether they would adopt the provisions of the above mentioned act. At the election the proposition received a large majority of the votes cast. Subsequently the County Court divided the county into a suitable number of townships to meet the requirements of the people under the proposed new system. But afterwards, at the May term, 1873, the County Court refused to district the county, and to order an election for justices to constitute the new County Court, upon the ground, that the act of March 24, 1873, repealed the act of March 18, 1872, and that Vernon county had not adopt-

ed the township organization law, so as to authorize the County Court to district the county and order an election. The sole and only question therefore presented is, whether the act of 1873, to more fully provide for the organization of counties into municipal townships, and to more fully provide for the local government thereof, has any application to Vernon county, so as to require the authorities to proceed under it. The two acts are upon the same subject and intended to accomplish the same object. They must accordingly be construed together in arriving at the legislative intent. There is no doubt of the correctness of the general rule, that *lege posteriores priores contrarias abrogant.* But this rule has its limitations.

The act of 1873 is really nothing more than a revision of the act of 1872. Some of the provisions in the two acts are identical, and they all relate to the same subject matter. The purpose of the later enactment was to remedy defects that were supposed to exist in the former. The subsequent law was not designed to interrupt the continuity of the first act, so as to avoid or annul proceedings commenced under it.

By the first section of article 17, in the act of 1873, [Sess. Acts, 1873, p. 120,] it is provided, that the County Court in each county having adopted the township organization, at their first meeting after the adoption of the act shall proceed to district their respective counties, as directed in article fifteen, for the purpose of electing County Court judges, and shall appoint a day for the purpose of electing the same. Then after making various provisions, not necessary to be here noticed, the 6th section declares, that an act entitled, "an act to provide for the organization of counties into municipal townships, and to further provide for the local government thereof," approved March 18, 1872, is hereby repealed.

This last section does, in terms, repeal the former law, but the effect is not to be ascribed to it of completely annulling all proceedings commenced when the former law was in force. The first section, which explains and prescribes the mode of executing the act, says, the County Court in each county hav-

ing adopted the township organization of this State, at their first meeting after the passage of this act shall proceed, etc. As a law existed providing for township organization before, and the provision for putting it in force is essentially the same in both acts, the latter law must be construed as a mere continuation of the former, and one vote of the people is sufficient. But after the passage of the act of 1873 all subsequent proceedings must conform to it.

Under the law the repeal did not affect or render nugatory the acts done, for the statute expressly provides, that the repeal of any statutory provision shall not affect any act done or right accrued or established in any proceeding; but that every such act, right and proceeding, shall remain as valid and effectual as if the provisions so repealed had remained in force, (W. S. 895, § 5,); as the repealing section did not affect or impair the vote of the people of Vernon county in adopting the law in favor of township organization, it results that the law was then in full force, and that the new act simply gave it application and direction.

I am of the opinion that the judgment should be affirmed. The other judges concur.

JEMIMA SHAW, Plaintiff in Error, *vs.* JOHN J. DINWIDDIE, Defendant in Error.

1. *Practice, civil—Supreme Court—Final judgment.*—A writ of error will be dismissed when there was no final judgment in the court below.

Error to Morgan Circuit Court.

A. W. Anthony, for Plaintiff in Error.

Draffin, for Defendant in Error.

SHERWOOD Judge, delivered the opinion of the court.

There is no final judgment in this cause, and for that reason the writ of error will be dismissed. Judge Adams absent. The other judges concur.

J. CHRISTY WATSON, Respondent, *vs.* MONITEAU COUNTY, Appellant.

1. *Juries—Board and lodging of—County, liability of.*—When a County is liable for the proper costs of a trial, it is liable for the board and lodging of the jury therein, provided by the Sheriff in pursuance of the order of the Court.

Appeal from Moniteau Circuit Court.

Moore & Williams, for Appellant.

1. Chap. 38, Art. 2, W. S. 348, governs the liability as to what criminal costs shall be paid by the State, County, and the prosecutor, and there can be no liability except that which is imposed by the plain provisions of the Statute. (Phelps County vs. Bishop, 46 Mo., 68.)

2. If it be contended that the board of the jury in this case is simply a matter of contingent expenses, to be paid by the county, the same as fuel, lights, &c., then it follows that the County of Cole would be liable to pay its own contingent expenses, whence this case came by change of venue.

Owens & Woods, for Respondent.

1. If any County is liable to pay for this item of board and lodging, Monteau County is the proper party to pay. (W. S. 351, § 19.)

2. There can be no doubt as to the authority of the Circuit Court to make the order it did in reference to the separation of the jury, and for the sheriff to procure board and lodging for said jury, during the pendency of the trial. (McLean vs. State, 8 Mo., 153.) It certainly follows, that if the court had the authority to make the order in question, there is an implied liability, on the part of the County, to pay the necessary expenses incurred in carrying out said order. (Commissioners vs. Hall, 7 Watts, 290.)

NAPTON, Judge, delivered the opinion of the court.

The only question in this case is as to the propriety or legality of an item in a bill of costs in a capital case for the board and lodging of a petit jury during the trial. The court

ordered the jury to be kept together during the trial and not allowed to separate, and to be provided with board and lodging. There is, it seems, no express provision in the statute in relation to such an expense, though there is no question of the power of the court to make such an order, nor is there any controversy in regard to the liability of this County for the proper costs of the trial in this case. It does not appear from the record how the case resulted, whether in acquital or conviction, and it is conceded that Moniteau County is responsible for the costs, but it is denied that this item is properly included in the bill of costs.

In the case of Commissioners vs. Hall, 7 Watts, Gibson, C. J., held a county liable for the expenses of boarding and lodging a jury—although in Pennsylvania, as here, there was no provision in the statute concerning such expense. He considered such expenditures, like that of fuel and lights, incidental to the holding of a court and raising an implied obligation on the part of the County. And the 19th and 20th sections of our statutes, concerning costs in criminal cases, clearly provides, that Cole County (where the case was tried on change venue from Moniteau County) is not liable.

It seems from the record in this case, that the entire bill of costs was certified by the Judge against Moniteau County, and all the items paid except this one. There is, therefore, no point raised as to the liability of the State.

Judgment affirmed. The other Judges concur.

STATE OF MISSOURI, to use of JOHN B. HAYNES, Respondent, *vs.* HENRY A. WEBSTER, *et al.*, Appellants.

1. *Jeofails, Statute of—Practice, civil—Pleadings—Allegations—Attachment bond.*—A petition on an attachment bond, which does not allege that the State sues, but sets forth by sufficient averments the title of B., for whose benefit the bond was made, and who is the real party in interest, and all the facts entitling him to recover, must be held good after verdict.

Appeal from Polk Circuit Court.

Waldo P. Johnson, for Appellants.

It is not averred in the body of the petition that the State sues. [State vs. Matson, 38 Mo., 489.)

Reckhow & Underwood, and E. L. Edwards, for Respondent.

1. The petition contains an averment that defendants executed their bond to the State, which states the fact sufficiently. (Hayden vs. Sample, 10 Mo., 215.)

2. If the petition were originally defective, the deficiency is cured by the verdict and judgment. (Shaler vs. Vanwormer, 33 Mo., 386; Richardson vs. Farmer, 36 Mo., 35; Stephens vs. Frampton, 29 Mo., 264.)

3. The objections to the proceedings are purely technical, and are not entitled to favorable consideration. (Haygood vs. McKoon, 49 Mo., 77; Newton vs. Miller, 49 Mo., 298.)

WAGNER, Judge, delivered the opinion of the court.

The only point raised by the record, or relied on for a reversal, is that the court erred in over-ruling defendants' motions in arrest of judgment.

The suit was on an attachment bond, and it is objected that it is not stated in the body of the petition that the State sues. But it appears from the pleading, that Haynes for whose benefit the bond was made, and who is the real party in interest, sets forth by sufficient averments his title and all the facts entitling him to recover. This distinguishes the case from State vs. Matson (38 Mo., 489), and although the petition may have been technically defective, yet it must be

held good after verdict. (W. S., 1036, § 19; Haygood vs. McKoon, 49 Mo., 77.)

It is farther alleged as error, that two separate and distinct breaches are alleged and there is but one finding of facts. But this allegation is not borne out by the record. However indefinite or inappropriate the pleader may have been in the use of language, there is substantially but one breach assigned.

What purports to be the first breach is simply that a right of action has accrued for the penalty of the bond, and then in the second assignment the damages are specifically set out and judgment asked. There is but one prayer for judgment, and in effect but one breach, and although the petition is inartificially drawn, we must now hold it good.

The judgment of the court below was correct on the merits, and nothing but mere technical objections are urged against it.

Judgment affirmed. The other Judges concur.

JAMES R. SHIELDS, *et al.*, Defendants in Error, *vs.* JULLA C. SHIELDS, *et al.*, Plaintiffs in Error.

1. *Practice, civil—Error, writ of—Exceptions, bill of—Exceptions saved.*—On a writ of error, no exceptions being saved and no bill of exceptions filed, judgment will be affirmed.

Appeal from Boone Circuit Court.

A. J. Harbinson, for Plaintiffs in Error.

R. T. Prewitt, for Defendants in Error.

WAGNER Judge, delivered the opininion of the court.

In this case no exceptions are saved, nor is there any bill of exceptions incorporated in the record.

The judgment will therefore be affirmed, the other judges concurring.

J. P. HAMBLIN, Appellant, *vs.* H. DUNN, Respondent.

1. *Justices' Courts—Pleadings—Attachment—Plea in abatement—Inaccuracy.*—In a suit by attachment before a justice, the plea in abatement put the truth of the grounds for attachment, as alleged by plaintiff, in issue on the day of the making of the plea instead of on the day the affidavit for an attachment was made. *Held*, this was an inaccuracy committed by the justice, and might have been corrected by motion at the proper time, and is no ground for interference by this court.

Appeal from Jackson Circuit Court.

Johnson & Bottsford and Tichnor & Warner, for Appellant.

The plea in abatement did not put in issue the facts alleged in the affidavit, and should have been disregarded. (W. S., 189, § 41; 196, § 74.)

J. J. Cranthell & S. P. Twiss, for Respondent.

WAGNER, Judge, delivered the opinion of the court.

This was a suit by attachment before a Justice of the Peace. The affidavit which was made and filed on February 8th, 1871, alleged that the defendant was indebted to the plaintiff, and was about to remove his property or effects out of the state, with intent to defraud, hinder, or delay his creditors; that he was about to remove out of the state with intent to change his domicil, and that the debt sued for was fraudulently contracted on the part of the debtor.

A writ of attachment was issued on the day, on which the affidavit was filed, and duly served, and on the 23rd day of February, 1871, the defendant filed his plea in abatement, stating "that he is not about to remove his property or effects out of the state with intent to defraud, hinder, or delay his creditors, and further that he is not about to remove out of the state, with intent to change his domicil, and that the debt sued for was not fraudulently contracted on the part of the debtor." A trial of this plea before the Justice of the Peace having resulted in a verdict for the defendant, the case was appealed to the Circuit Court. In the Circuit Court both parties gave evidence tending to support the issues joined, and at the close of the testimony the plaintiff asked the court to de-

clare the law to be: "That, as the affidavit for attachment was sworn to February 8th, 1871, and the writ of attachment was issued by the Justice on the same day, and as the defendant filed his plea in abatement on February 23rd, putting in issue the truth of the matter in said affidavit on the 23rd, and not as to the truth of the same on the 8th day of February, 1871, the day of the affidavit was made out and writ issued, therefore there is no plea in abatement as required by law, and the attachment must be sustained." This declaration the court refused to give, and upon the evidence adduced, the issue was found for the defendant, and the attachment dissolved. The question here is a very narrow one. It is true, that the affidavit stated that the alleged things were about to done on a certain date, and the plea in abatement negatived these allegations at a different time. But no notice was ever taken of the supposed defect in the plea till after all the evidence was given. The plaintiff and defendant both introduced all the evidence they had on their respective sides, and after the plaintiff, as we may fairly presume, failed to make out his case, the thought then occurred to him that he could succeed by resorting to a technical question of pleading. The issue was made up before the justice, where no precision in pleading is required. The justice notes down the plea on his docket, and the party should not be held responsible for any inaccuracy committed by the officer, and such this entry obviously was. By a motion at the proper time, the defect could have been easily cured, but as the plaintiff seems to have been satisfied till he was about to lose his case, we will not interfere in his behalf.

Let the judgment be affirmed. The other judges concur.

STATE OF MISSOURI, Appellant, *vs.* THOS. A. SMITH, Respondent.

1. *Practice, criminal—Indictment—Murder in the first degree—Verdict for a lesser degree—New trial—Effect of.*—An indictment for murder in the first degree, followed by a verdict for a lesser degree, followed by the granting of a motion for a new trial, operates as an acquittal to the defendant of the charge of murder in the first degree; yet he can be tried again, as well for the same offense, as for any of the minor offenses which are embraced in an indictment for murder in the first degree. [State v. Ross, 29 Mo., 39, affirmed.] The line of defense, which the prisoner may design to pursue at a subsequent trial, does not affect the question.

Appeal from Boone Circuit Court.

H. Clay Ewing, Attorney General, for Appellant.

I. Upon an indictment for murder in the first degree, and a conviction under such indictment for murder in the second degree, upon a new trial granted upon the motion of defendant, he cannot be again tried for murder in the first degree, but may be for murder in the second degree or for any degree of manslaughter. (State vs. Ross, 29 Mo., 39.)

(*a.*) Conviction for murder in the second degree is, by necessary implication, acquittal for murder in the first degree. (State vs. Ball, 28 Mo., 327; Jones vs. State, 13 Tex., 184; 1 Bish. Crim. Law, § 676.)

(*b.*) It would have been, upon the motion of defendant granting him a new trial in this case, competent to put him upon his trial for any offense, less than murder in the first degree, included in the indictment. (Lithgow v. The Comm., 2 Va. Cases, 311; State v. Kittle, 2 Tyler, 471; Campbell vs. State, 9 Yerg., 335; People vs. Gilmore, 4 Cal., 476; Esmon vs. State, 1 Swan., 14; Hunt vs. State, 25 Miss., 381; Brennan vs. The People, 15 Ill., 517.)

II. Upon a trial of a person indicted for an offense, consisting of different grades, the court may, by suitable instructions, if the evidence warrants it, direct the jury that the case belongs to one of the special grades, and they must find their verdict accordingly. (State vs. Jockel, 44 Mo., 234; State vs. Shoenwald, 31 Mo., 147; State vs. Starr, 38 Mo., 270.)

Guitar & Pierce, for Respondent.

SHERWOOD, Judge, delivered the opinion of the court.

Smith was indicted in the Boone Circuit Court for murder in the first degree; a trial had, resulting in a verdict for murder in the second degree, and judgment accordingly; but on his motion for a new trial, the verdict was set aside. At a subsequent term, he filed his motion to "dismiss the indictment,"—assigning as grounds:

1st. That, having been put on trial for murder in the first degree, and the jury having found him guilty of that offense in the second degree, and that verdict having been, on motion of defendant, set aside, and a new trial granted, he could not be put on trial for murder in the first degree.

2d. That, as defendant's defense was founded only on the insanity of defendant, if found guilty he could be convicted alone of murder in the first degree. This motion was sustained, and the cause dismissed, and the State excepted, and, after filing an unsuccessful motion to set aside the order of dismissal, again excepted, and brings the case here by appeal.

Treating the action of the court as tantamount to a discharge of the accused, which, it will be presumed, in the absence of anything in the record to the contrary, immediately followed, we will examine into the correctness of that action. And the law in this State is so well settled, that an examination in this regard would seem scarcely necessary. In the case of the State vs. Ross, 29 Mo., 39, the leading decision on the subject, it was held, that where a defendant was tried on an indictment for murder in the first degree, and found guilty of a lesser grade of homicide, and a new trial on his application granted, the verdict of the jury in the new trial was, by operation of law, an acquittal of murder in the first degree, yet that the prisoner might well be tried again, as well for the particular offense of which he had been found guilty, as for any of the minor offenses, which under our code of criminal procedure are embraced in an indictment for murder in the first degree. And that case (notwithstanding the very able dissenting opinion

of Judge Scott, who held that when a party indicted for murder was found guilty of an inferior grade of that crime, and obtained a new trial, that thereby the whole matter was opened for re-examination, regardless of any anterior proceedings had,) in all subsequent adjudications of the point in hand has been barely referred to as an unquestioned settlement of the rule of law in that respect.

It follows that the court should have promptly overruled the motion of defendant, as very clearly he was not entitled to a discharge, no matter what might have been the line of defense he designed pursuing at a subsequent trial. For this reason the judgment will be reversed, and the cause remanded.

Judge Adams absent; the other judges concur.

THE INHABITANTS OF THE TOWN OF CLINTON, Defendants in Error, *vs.* SAMUEL K. WILLIAMS, Plaintiff in Error.

1. *Jeofails, Statute of — Petition — Averments omitted — Verdict.*—When the necessary averments are omitted in the petition, such defect is not cured after verdict by the statute of amendments.

Error to the Henry County Court of Common Pleas.

F. P. Wright, for Plaintiff in Error.

The petition does not state sufficient facts to show that plaintiffs have any cause of action against defendant. (Gould's Pl., 160.)

McBeth & Price, for Defendants in Error.

The omissions in the petition are cured by the verdict. As a finding on those points was necessary to the finding of the verdict rendered, it will be presumed that their omission was supplied by the evidence. (Roper vs. Clay, 18 Mo., 383; Richardson vs. Farmer, 36 Mo., 35; Shaler vs. Van Wormer, 33 Mo., 386.)

VORIES, Judge, delivered the opinion of the court.

This action was brought by the inhabitants of the town of Clinton to recover from the defendant certain taxes charged to be due from him to the plaintiff as taxes for the year 1870, together with a penalty thereon for non-payment.

The petition charges, that the defendant is indebted to plaintiff for taxes due plaintiff for the year 1870, levied by plaintiff as such corporation upon the assessed valuation of the property of defendant situate in the limits of the corporation of the inhabitants of the town of Clinton, and for ten per cent. penalty added to said tax by the collector of plaintiff after the 2d Monday of October, 1870, said tax being then delinquent and unpaid for the year 1870; that the amount of taxes due for said year appears on the tax-book as follows: (The plaintiff then sets forth a tabular statement of the taxes and penalty due, showing the Addition of the town, the lot and amount of taxes, and penalty, levied on each, amounting in all to $67 60). The petition then charges, that said tax and penalty is due plaintiff, and prays judgment therefor, and prays that a special judgment be rendered against the property taxed, and that the same be sold to satisfy the judgment, as provided by an ordinance of the inhabitants of the town of Clinton, entitled "an ordinance to provide for the levying, assessing and collecting of the revenue of the inhabitants of the town of Clinton," passed April 9th, 1870.

The defendant by his answer simply denies that he is indebted to plaintiff, either for the taxes or penalty charged, or on any other account, and then makes a sweeping denial, in which he states that he "denies each and every material allegation in the petition necessary to be denied or controverted."

A trial of the cause was had by the court, a jury having been waived. The plaintiff to maintain the issues on his part introduced one Stevens as a witness, who testified, that he was clerk of the board of trustees of the inhabitants of

the town of Clinton, that as such he had the custody of the books of the town. The plaintiff then offered to read in evidence an order entered on said books, by which one G. S. Ellis purported to have been appointed the collector for the inhabitants of the town of Clinton.

The defendant objected to the introduction of said order as evidence on the ground, that it had not been shown that plaintiff had any authority to make said appointment. This objection was overruled, and the defendant excepted. G. S. Ellis then testified, that he was the collector of the inhabitants of the town of Clinton, and produced the tax-book of plaintiff for the year 1870, and read therefrom entries of what purported to be assessments of taxes on certain town lots therein set forth, which were charged to defendant. The defendant also objected to this evidence for the reason, that no authority had been shown in the plaintiff to levy and collect taxes, and that it was not shown that the defendant was the owner of the property taxed.

The witness also stated, that he had been appointed the collector of taxes since the taxes read in evidence were assessed, and that he only knew that the taxes had not been paid by the entries on the book. The above was all of the evidence given in the cause.

The defendant then asked the court to make several declarations of law, some of which were given and others refused; but they need not be noticed here.

The court then rendered a judgment in favor of the plaintiff for the sum of $61 47, directing that the property assessed be sold to pay the same.

The defendant filed motions for a new trial and in arrest of the judgment. It is set forth in the motion to arrest the judgment as ground for said motion, that the petition does not contain sufficient facts to constitute a cause of action, and that said petition fails to show that said plaintiff is a corporation and entitled to sue, etc.

These motions being severally overruled the defendant again excepted, and has brought the case here by writ of error.

There are several grounds relied on by the plaintiff in error for the reversal of the judgment rendered in this case, but it will only be necessary to notice one of them.

The petition is so clearly defective that it is impossible to sustain any judgment rendered in the cause. It is not averred in the petition, that the plaintiff is a corporation, or that it was incorporated in any manner, either as a municipal corporation or otherwise; nor are there any other averments, from which a legal authority in the plaintiff can be inferred to either levy or collect taxes; all that is stated in the petition may be true, and yet no liability exist on the part of the defendant to pay the taxes sued for.

It is true, that the answer of the defendant is so indefinite as to admit almost all the allegations of the petition, yet it denies the liability of the defendant to pay the taxes sued for; but if the whole of the facts stated in the petition were admitted, still no cause of action appears.

It is contended, however, that the defects in the petition were cured by the verdict, and that under our statute of amendments the judgment ought not to be arrested. This would be true, if these material allegations had been in some way, but defectively, stated, and no objection taken to their sufficiency until after verdict. The insufficient allegations in such case would be cured after verdict. But in this case the defendant objected to the evidence when offered on the ground, that no authority had been shown in plaintiff to levy and collect taxes, thus attempting to take advantage of these defects in the petition and evidence before verdict, and it will be seen, that there is an entire want of any allegation showing that plaintiff was a municipal corporation, or that it was in any way authorized to either levy or collect taxes. And in fact it appears from the bill of exceptions, that the proof was just as deficient in this particular as the petition. This, then, not being a case in which the averments are only defectively stated in the petition, but are wholly wanting or omitted, the statute of amendments can not cure the defects. (Frazier vs. Roberts, 32 Mo., 457; Jones vs. Tuller, 38 Mo., 363.)

The motion in arrest of the judgment ought to have been sustained, and for the error of the court in overruling said motion, and in rendering judgment in favor of the plaintiff, said judgment will be reversed, with leave to the plaintiff to file an amended petition in the case.

The other Judges concur, Judge Adams not sitting.

ROBERT C. CROWELL, *et al.*, Appellants, *vs.* ALFRED PLANT, *et al.*, Respondents.

1. *Bills and Notes—Orders—Acceptance, conditional—Contract pending.*—The acceptance of an order for money, stated therein to be against sums due on a pending contract, is a conditional acceptance, and a subsequent breach of the contract by the drawer may be a good defence to a suit on such acceptance.

Appeal from the Jackson Circuit Court.

John K. Cravens for Appellants.

Where an order is drawn upon a party, and upon the face of the order it is payable out of an indebtedness of the drawee to the drawer, it is a bill of exchange, and any reference in the order to the source of the indebtedness, informing the drawer how he may re-imburse himself, does not change its character. (Pars. Bills and Notes, 44 and note. Edw. on Bills and Notes, (top page) 136.)

Twiss & Cook, for Respondents.

The order is in express terms drawn on and payable out of a particular fund. To enable the plaintiff to recover on such an order he must aver and prove that the fund was sufficient. (Edw. on Bills, 420; 1 Parsons on Notes, etc., 304; Owens vs. Lavine, 14 Ark., 389; Atkinson vs. Manks, 1 Cow., 691; McGee vs. Larramore, 50 Mo. 425.)

ADAMS, Judge, delivered the opinion of the court.

The plaintiffs sued the defendants as acceptors of the following instrument of writing:

"KANSAS CITY, Mo., Oct. 28, 1869.

Messrs. Plant Bros., Pratt & Co.:

Thirty days after date, pay to the order of Messrs. Crowell & Co., two hundred (200) dollars, out of any money due me for roofing warehouse in West Kansas City, and you are hereby authorized to hold back that amount on my contract for doing said roofing, for the purpose of covering this order.

M. P. BURR."

Across the face of which is written: "Accepted, Plant Bros., Pratt & Co.;" endorsed, "Protest waived, M. P. Burr."

The petition counts on this writing as an absolute acceptance for the payment of two hundred dollars in thirty days after the date. The second amended answer of defendant admits the execution of the instrument, and the acceptance of it by the defendant, but denies that it was an absolute promise to pay the money, and sets up that it was conditional, as the face of it shows that it was to be paid out of a particular fund which never did accrue; and the answer charges that Burr abandoned the work and never performed the contract, and no money ever became due to him out of which the acceptance could be paid.

The plaintiffs moved to strike out this defense; but the Court overruled the motion, and the plaintiffs excepted. The plaintiffs then moved for a judgment on the pleadings, and the court overruled this motion; and, the case being called for trial, the plaintiff took a non-suit, with leave to move to set it aside, and afterwards, in due time, moved the court to set aside the non-suit, alleging as reasons the action of the Court in refusing to enter judgment in their favor on the pleadings. This motion was also overruled, and exceptions duly saved, and a final judgment of non-suit rendered, from which the plaintiffs have appealed to this court.

It is plain to my mind, that the acceptance sued on was not an absolute promise to pay so much money. The very terms of the instrument show that it was to be paid out of the proceeds of a pending contract, which the second amended answer alleges never was complied with; and no money ever ac-

crued to the drawer out of which the acceptance could be paid. This was a good defense, and it is properly charged in the answer. (See Kingsbury vs. Pettis county, 17 Mo. 479; Campbell vs. Polk county, 49 Mo. 214.)

Objections were urged in the court below against allowing a second amended answer to be filed; but I see nothing in the objections worthy of comment here.

Let the judgment be affirmed. The other judges concur.

ALBERT JONES, Appellant, *vs.* GODFREY MACK, Respondent.

1. *Mortgages—Legal title—Forfeiture—Possession by mortgagee.*—A mortgage conveys the legal title, and after forfeiture the mortgagee, or those holding under him by foreclosure or color of title, may enter into possession, and hold it against the mortgagor. [Jackson vs. Magruder, 51 Mo., 55, affirmed.]
2. *Mortgages—Mortgage, assignee of—Possession—Redemption—Ejectment.*—A purchaser at a mortgagee's sale, who has paid the money, is substituted to the rights of the mortgagee; and in case the foreclosure is not legally conclusive, he cannot be dispossessed by the mortgagor by action of ejectment, but the mortgagor can redeem the property.

PER SHERWOOD, JUDGE, dissenting—VORIES, JUDGE, concurring.

1. *Mortgages—School funds—Court, county—Order of sale—Sheriff, sale by—Ejectment.*—A sale of lands, mortgaged for school funds loaned, made by the sheriff without the proper order from the County Court, is a complete nullity, and such title is no *legal* defense to the purchaser against an action of of ejectment by the mortgagor.
2. *Mortgages—Satisfaction—Law, Equity.*—Though a mortgage may be satisfied at law, yet equity will treat it as satisfied or not, in accordance with what it deems will best subserve and promote the equities of the case.

Appeal from Johnson Court of Common Pleas.

Phillips & Vest, and Crittenden & Cockrell, for Appellant.

I. The sale by the sheriff in the case at law, no order being issued to him by the County Court, was *coram non judice*, and the deed made by him to defendant passed no title.

a. When statutory powers are conferred on an inferior tribunal of limited and statutory powers, and a mode of execut-

ing such powers is prescribed, the mode prescribed must be strictly pursued, or the acts of such tribunal are *coram non judice*, and void. (English vs. Smock, 34 Ind., 115; 7 Amer. Rep., 215; Adam vs. Tiernan, 5 Dana., 394; Frees vs. Ford, (3 Seld.,) 6 N. Y. 176; Peacock vs. Bell, 1 Sand., 74, *b.*)

b. In the case of a mere power, unless where aided by statute, there is no foundation for its exercise but in its terms. If there is a departure from these, the act must of course fall to the ground for want of authority. (Norcum vs. D'Oench, 17 Mo., 117.)

c. The sheriff's deed, in case of sale under the statute in question, is like that of a sheriff under execution, or a trustee, or executor, having a mere naked power of sale under certain circumstances, and "must recite the power, and show on its face, that the contingency has happened, which would authorize the sale." (Swartz vs. Page, 13 Mo., 611; Bruce vs. Duke, 2 Lit., 245; Sug. Power, 282, 232.)

White & Baldwin, for Respondent.

I. Granting that the want of an order by the court to the sheriff to sell, would leave the equity of redemption in Jones unforeclosed and existing; the sheriff having the power to convey the legal title to the premises—by his deed gave to the purchaser the legal title—and the mortgagor cannot maintain ejectment against him. (Pease vs. Pilot Knob Iron Co., 49 Mo., 124.)

II. The deed of the sheriff to the purchaser, made under the power in the mortgage, even if violating the terms of the trust, vests in the mortgagor the legal title, and the purchaser cannot maintain this action. (Am. Law. Reg., 2 N. S., 725, 726, § 31, and authorities there cited; Taylor vs. King, 6 Munf., 358; Harris vs. Harris, *Id.*, 367; Gibson vs. Jones, 5 Leigh, 370; 13 Gratt., 601; 2 Patton & Heath, 240; 8 Leigh, 371; Reese vs. Allen, 5 Gill., 236; 12 Wheat., 570; Bank of U. S. vs. Benning, 5 Cranch, C. C., 81; Beatie vs. Butler, 21 Mo., 313; 4 G. Green, 468; Am. Law Reg., 2 N. S., 731, § 38.)

III. An attempted sale under a power to sell, by which no title passes, will yet amount to an assignment of that part of the mortgage debt for which the premises were bid off, and the payment of the purchase money gives the purchaser such an interest in the outstanding title of the mortgagee, as will defeat ejectment by the mortgagor. (Am. Law Reg., 2 N. S., 724, § 30; Walker's Ch. 494; 1 Clark Eq. Cas., 109; 29 Mo., 152; 12 Mo., 603; 46 Mo., 384.)

Adams, Judge, delivered the opinion of the court.

This was an ejectment for a quarter section of land in Johnson county.

The plaintiff showed a clear paper title.

The defendant set up a sheriff's sale and deed under a mortgage, which had been given by the plaintiff to the county of Johnson to secure a debt due for school funds. The mortgage was in the form prescribed by the 22nd section of the 2nd article of the act entitled, "an act to provide for the organization, support and government of common schools in the State of Missouri, approved Dec., 12, 1855," which provides, that "every mortgage, taken under the provisions of this act, shall be in the ordinary form of a conveyance in fee, shall recite the bond, and shall contain a condition, that if default shall be made in the payment of the principal or interest, or any part thereof, at the times when they shall severally become due and payable according to the tenor and effect of the bond recited, the sheriff of the county may, without any suit on the mortgage, proceed and sell the mortgaged premises, or any part thereof, to satisfy the principal and interest, and to make an absolute conveyance thereof in fee to the purchaser; which shall be effectual to all intents and purposes as if such sale and conveyance were made by virtue of a judgment of a court of competent jurisdiction foreclosing the mortgage." (See Rev. Stat. 1855, p. 1224.)

On the 21st day of May, 1865, the County Court of Johnson county made the following order, which was relied on as authorizing the sheriff to proceed and sell the land.

"Johnson county vs. Albert Jones } Mortgage order of sale.

Ordered by the court, that the County Attorney proceed and close the mortgage in the above entitled cause by selling the whole, or so much of the real estate therein mentioned as will be sufficient to pay the demands of said plaintiff."

The sheriff afterwards sold the land, and made the deed under which the defendant claims, and the mortgage was entered satisfied by virtue of the sale.

This is in substance the defendant's case as made by the evidence.

The court decided, that this evidence was sufficient to defeat the plaintiff's right of recovery, and made formal declarations of law to that effect, and the plaintiff took a non-suit with leave to move to set the same aside, and did file a motion to set aside the non-suit, which was overruled, and exceptions duly saved.

The school law vests in the County Courts the care and management of the school funds of the respective townships within their jurisdiction. (2nd Rev. Stat. 1855, § 15, p. 1422.) The County Courts have the whole control of these funds, and have the care and custody of the bonds and mortgages given to secure loans. The sheriff has no control. whatever, over the school funds, and has no power to act on his own motion in the foreclosure of mortgages. He can only act in obedience to the orders of the County Court. Section 30 of the 2nd article of the act above referred to (2nd Rev. Laws, 1855, p. 1422,) provides that, "whenever the principal and interest or any part thereof, secured by a mortgage containing a power to sell, shall become due and payable, the County Court may make an order to the sheriff, reciting the debt and interest to be recovered, and commanding him to levy the same with costs of the mortgaged premises, which shall be described as in the mortgage; and a copy of such order duly certified, being delivered to the sheriff, shall have the effect of a *fieri facias* on a judgment of foreclosure by the Circuit Court, and shall be proceeded on accordingly."

This section provides the only summary method of foreclosing mortgages by the County Court. The order of sale must substantially comply with its provisions, otherwise the proceeding would be irregular, and a sale under it would not amount to a foreclosure.

It is very manifest that the order of sale, under which the sheriff acted in this case, did not comply with the statute, and was no authority for foreclosing the mortgage. Still the sale was made, and the debt of the county due from the plaintiff for the school funds was satisfied by the money of the defendant.

Under this purchase the defendant took possession of the land, and he certainly has the right, under these circumstances, to protect his possession by setting up this mortgage. A mortgage conveys the legal title, and after forfeiture the mortgagee, or those holding under him by foreclosure or color of title, may enter into the possession and hold it against the mortgagor. (Jackson vs. Magruder, 51 Mo., 55.)

Although the sale by the sheriff did not amount to a foreclosure, yet as it resulted in the payment of the school debt due from the plaintiff, the defendant by his purchase became substituted to the rights of the county as mortgagee. The plaintiff as mortgagor may still redeem the land. But he can not maintain ejectment against the defendant, who is thus in possession as assignee of the mortgage.

Under any view that we can take, the judgment was for the right party.

Judgment affirmed. Judges Wagner and Napton concur in the result. Judges Vories and Sherwood dissent.

Sherwood, Judge, delivered the dissenting opinion.

In so much of the foregoing opinion, as holds that the sheriff had "no authority to foreclose the mortgage," I concur.

But as to the residue of that opinion, and the conclusions therein arrived at, I must dissent, and for these reasons:

An ordinary mortgage conveys to the mortgagee the legal estate, which the latter may also transfer. And if the mort-

gage contains a power of sale, and the mortgagee, upon condition broken, attempts an execution of that power, but fails to comply with the conditions upon which a valid exercise of that power depends; yet his conveyance, in so far as passing the bare legal title is concerned, (though burdened as before with the equity of redemption,) will be effectual. And his assignee, the possessor, at all events, of the legal title, is in a position to defend that title in an action at law.

Not so with the sale and conveyance made by the sheriff in the case under consideration; as he had neither the legal title in the mortgaged premises (that being by the terms of the mortgage vested in the county); nor the power of sale, as the requisite order of sale had not been made by the County Court, "and a copy of such order duly certified" was not delivered to him. It follows then, that this attempted sale and conveyance was a complete nullity; and therefore unlike, in its incidents and results, a defective sale and conveyance when made by an ordinary mortgagee.

This I regard as an important and solid distinction between the two cases, and one which seems to have escaped the attention of the majority of my associates.

The money, however, of the defendant having discharged the mortgage debt, he was clearly entitled to be subrogated to the rights of the county upon making the proper application for such equitable relief.

But most certainly the defendant did not by the mere fact of "his purchase become substituted to the rights of the county as mortgagee."

The mortgage being satisfied, as a matter of course it ceased to constitute an outstanding title and therefore was worth less as a defense at law, no matter by whom, nor under what circumstances, such satisfaction was made.

But a court of chancery will treat a mortgage as satisfied, or not satisfied, in accordance with what it deems will best subserve and promote the equities of the case.

The defendant having in his answer relied on a purely legal defense, he clearly should not have been permitted at the

trial to avail himself of one merely equitable. (Kennedy vs. Daniels, 20 Mo., 104.)

For these reasons I think the judgment ought to be reversed, and in this opinion Judge Vories concurs.

———o———

MECHANICS' BANK, Respondent, *vs.* T. P. WRIGHT, *et al.*, Appellants.

1. *Bills and Notes—Bonds—Parol testimony—Principals—Sureties.*—Parol testimony is admissible to prove who are principals and who are sureties to notes or bonds in actions at law.
2. *Presumptions—Payments—Separate credits—Joint debts.*—A. was indebted to B. on a note made by himself and others, and after the maturity of said note he rendered services for B., who at settlement, paid A. some money. *Held*, that in a suit on said note by B., there was no presumption that A. had paid it.

Appeal from Benton Circuit Court.

F. P. Wright and Johnson & Botsford, for Appellants.

I. Parol testimony was admissible to show that Ballow was the only principal, and that the defendants were securities. (Foster vs. Wallace, 2 Mo., 231; Garret vs. Ferguson's Admr. 9 Mo., 125.)

II. There was a general settlement between the Bank and Ballow, and a balance found due to Ballow. There is a legal presumption that a note made by Ballow and others, past due at the time of the settlement, was taken into consideration and paid, unless it appears that it was expressly excepted therefrom.

F. N. Judson, and Cline, Jamison & Day, for Respondents.

I. All the makers of the note sued on were equally liable to the plaintiff on the note sued upon, whatever may have been their relation to each other.

II. If the note in controversy is claimed by the defendants to have been included in any settlement between the plaintiff and Ballow, it was for the defendants to show that fact. They

may have had many settlements of various or particular matters existing between them, and yet this raises no presumption that the note in question, which is still owned and held by the plaintiff, was included in any such settlement.

WAGNER, Judge, delivered the opinion of the court.

This was a suit instituted upon a promissory note executed by DeWitt C. Ballow, together with the defendants and one Kays. Ballow died previous to the bringing of the action, and the plaintiffs compromised with Kays and released him, and the defendants were alone sued. The defendants, as a part of their defense, set up in their answer, that Ballow was the principal in the note and alone received the benefits thereof, and that the other signers were mere securities, and that this fact was known to the plaintiffs when the note was made. It was also alleged that Ballow was attorney for the plaintiff and had transacted a large amount of business for it, and that upon a settlement subsequent to the time the note became due, plaintiff owed Ballow and paid him a balance in money. From this fact the inference was sought to be drawn, that the note was paid off. But no evidence was given tending to establish this theory, and the replication positively denies, that the note was paid by Ballow or taken into account at the settlement. At the trial the court refused to permit defendants to show that they signed the note as securities, and under these instructions the jury gave a verdict for the plaintiff. The cause is now brought here for review, and the errors assigned are: First, That the court erred in excluding the evidence to prove that defendants were sureties; and second, that error was committed in giving and refusing instructions.

The law has long since been established in this State that parol evidence is admissible to prove who is principal and who is surety to a note or bond on an action at law. (Foster vs. Wallace, 2 Mo., 231; Garret vs. Ferguson's Admrs., 9 Mo., 125.)

The court therefore plainly erred in its ruling. The evidence should have been admitted. The first instruction given

by the court at plaintiff's request, told the jury in substance, that if they believed defendants and Ballow executed their promissory note, and the same was indorsed to plaintiff, and plaintiff was the owner of said note, then they should find for plaintiff whatever amount the evidence showed to be due thereon. The second instruction was to the effect, that the possession of the note, and its production in court, together with the indorsement thereon, was *prima facie* evidence of ownership in the plaintiff.

The second instruction needs no remarks, and the first was correct upon the evidence before the court.

If the defendants all executed the note as principals, and the same was indorsed and delivered to the plaintiff, and the plaintiff was the owner thereof, there could be no doubt respecting their liability.

The defendants asked two instructions, which were both refused. They are substantially the same, though formed in different phraseology, and the import of them is, that if Ballow, one of the payers of said note sued on, did and performed services for plaintiff after the note sued on became due and payable, and that, after the said services were performed, the plaintiff paid the said Ballow a balance found due him, then the jury have the right to presume that said note was paid off and liquidated in said settlement, unless expressly excepted therefrom.

This declaration was properly refused, if for no other reason, because it was not justified by the evidence in the case; so far as the testimony showed, all the parties were joint makers and equally bound, and there was no presumption that Ballow settled what was not exclusively his own debt. Besides the replication expressly denies that the note was settled, and it would require at least some proof to overcome the same.

But for the error of the court in refusing to allow the defendants to show that they were sureties instead of principals, this judgment will be reversed and the cause remanded. The other judges concur.

THE OSAGE VALLEY and SOUTHERN KANSAS R. R. Co. Defendant in Error *vs.* THE COUNTY COURT of MORGAN COUNTY, *et al.*, Plaintiffs in Error.

1. *Municipal Corporations—Railroads, power to subscribe to*—It is too late now to question the power of municipal corporations to subscribe to railroad corporations.
2. *Mandamus—Prayer—Facts alleged and established—Circuit Court*—The Circuit Court may disregard the prayer in the petition for a mandamus, and conform its final order to the facts alleged and established.

Error to Morgan Circuit Court.

Anthony & Spurlock for Plaintiffs in Error.

I. The 14th Section of the act incorporating this railroad is unconstitutional and against public policy, as it gives, to the County Court without restriction or limitation, the power to confiscate, by taxation, the entire property of any citizen of the county. (Wells vs. City of Weston, 22 Mo. 384; W. S. 36, § 16.)

II. The writ should not only show facts sufficient to entitle the relator to the relief he claims, but it should also show his right to all the claims. (Moses Mand. 206, 207.) And the command of the writ must also be according to the duty. (Moses Mand. 209, 1 Hill, 50, 55; 35 Barb. 110.)

III. The peremptory writ must correspond with the alternative. (Moses Mand., 208, 209, 222.)

J. P. Ross, for defendant in Error.

NAPTON, Judge, delivered the opinion of the court.

This was an application to the Circuit Court of Morgan county, by the Osage Valley and Southern Kansas Railroad Company, for a mandamus directing the County Court of Morgan county to comply with the terms of a certain subscription to said company of $30,000, made at the November term of said court, 1870.

The order, as stated in the petition, appointed one Mills as Fiscal Agent of the county, and directed him to have bonds to the amount of $30,000 lithographed, and to sell them to the best advantage, and hand over the proceeds to the railroad company as the work progressed.

The petition asserted that the bonds were prepared and delivered to the court, and that the court refused to hand them over to the company, and the prayer of the petition is, that the court will issue a mandamus compelling the court to deliver said bonds to said company, or show cause to the contrary.

In the return to the alternative writ of mandamus the County Court mainly rely on the assertion, that said subscription "was falsely and fraudulently made by one justice of the said County Court, no other justice being present, as appears by the records of the said County Court," and they further aver that said court was not in session when said pretended order was made.

The return also sets up, that the company are not the fiscal agents of Morgan county, and that the company has no right to the bonds, according to the terms of the order authorizing the subscription.

They also insist, that the fourteenth section of the act entitled "an act to incorporate the Osage Valley and Southern Kansas Railroad Company, approved November 21,1857," upon which said subscription is based, is unconstitutional.

In the plea to the return there is a denial, that the subscription is fraudulent or against the Constitution of the State or of the United States.

By a replication to the plea an issue is made as to the facts asserted in the return.

After a trial of the issues the court ordered a peremptory mandamus, directing the court to deliver into the hands of the Fiscal Agent of Morgan county, or into the hands of such other person as may be appointed Fiscal Agent, the bonds isisued.

There was a motion in arrest, and a motion to set aside the judgment of peremptory mandamus. The bill of exceptions shows the evidence in the case, which consisted mainly of the records of the County Court, containing the order, and oral testimony by the three judges and the clerk as to the mode and manner of the order.

The points principally disputed in this court are:

First. The validity of the 14th section of the charter of the Osage Valley and Southern Kansas Railroad Company.

Second. That the order of the County Court was fraudulent and void.

Third. That the peremptory mandamus did not correspond with the alternative mandamus, nor with the prayer of the petition, but ordered the court to hand over the bonds to its Fiscal Agent and not to the plaintiff.

The first question hardly needs discussion. It is too late now to question the power of municipal corporations to subscribe to railroad enterprises. It might have been better if the courts had decided the question otherwise at the beginning, but this court, since the case of the City of St. Louis vs. Alexander, (23 Mo., 283), has acquiesced in the general and and prevalent doctrine. Millions of dollars have been invested on the faith of such decisions, and it would be a bold and hazardous experiment to undertake a new investigation of the subject. It is true that constitutional questions are always open to examination, but practically courts must regard precedents, on the faith of which the people have acted for years, especially where there can be a doubt concerning the matter decided. We believe, outside of the fifty or sixty cases deciding such subscriptions valid, there are perhaps two decisions to the contrary, and they are the opinions of learned and able jurists, but the courts generally—and this court among others—have uniformly sustained the power.

As to the alleged fraud in the order of the court, an issue of fact was presented by the pleadings, and tried by the court, and the court found against the appellant. The record showed that the court was in session, and that a majority of the judges made the order, and conceding the right to show the falsity of the record by oral proof, the testimony of the three judges and clerk fails to establish any fraud.

The peremptory, or final, order of the Circuit Court to deliver the bonds to their Fiscal Agent, instead of to the plaintiff, was undoubtedly right, although it does not correctly conform

to the prayer of the petition. The facts stated in the petition, and proved on the trial, required such an order, and the court may disregard the prayer of the petition and conform the final order to the facts alleged and established.

Judgment affirmed. The other judges concur.

MATTHIAS HELLER, *et al.*, Plaintiffs in Error, *vs.* THE MAYOR, ALDERMEN & CITIZENS OF SEDALIA, Defendants in Error.

1. *Municipal corporations—Fire department—Fires, losses by—Liability.*—A grant, by the Legislature to a city, of power to establish a fire department, confers a Legislative or discretionary power, and does not render the city liable, if the power is exercised, for losses occurring through fires.

Error to Henry Circuit Court.

Snoddy & Bridges, and F. P. Wright, for Plaintiffs in Error.

When a duty is enjoined upon an agent or servant of a municipal corporation, which is purely ministerial, and is violated, or not performed, or negligently performed, so that an injury results, the corporation is liable to the party injured. (Wilson vs. Peverly, 1 Amer. L. Cas., 465, and note, where the cases are collected; Hilsdorf vs. City of St. Louis, 45 Mo., 94; Ang. and Am. Corp., §§ 385–8, and cases in the notes.)

In the case at bar, the plaintiffs were compelled to pay their *pro rata* for the establishment and continuance of the fire department, and compelled, in case their property takes fire, to act as subordinates to the agent and employee of defendant.

Phillips & Vest, for defendants in error.

When the acts or omissions complained of were done or omitted in the exercise of a corporate franchise conferred upon the corporation for the public good, and not for private corporate advantage, then the corporation is not liable for the

consequences of such acts or omissions on the part of its officers and servants. (Murtaugh vs. City of St. Louis, 44 Mo., 480; Prather vs. City of Lexington, 13 B. Mon., 559; Martin vs. Mayor of Brooklyn, 1 Hill, 545; City of Richmond vs. Lang's Admr., 17 Grat., 375; Bailey vs. City of New York, 3 Hill., 538; Dargan vs. City of Mobile, 31 Ala., 469; Stewart vs. City of New Orleans, 9 La. An., 461; Western College vs. City of Cleveland, 12 Ohio St., 575; Sto. Ag., 393, 397, 590; Sherbourne vs. Yuba County, 21 Cal., 113; Dill. Munici. Corp., §§ 764, 765, and notes.)

A municipal corporation is not liable for the negligence of firemen appointed and paid by it, nor is such corporation liable to the owner of property destroyed or damaged by fire, in consequence of its neglect to provide suitable engines or fire apparatus, or to provide and keep in repair public cisterns. (Dill. Munic. Corp. §§ 774, 775, and cases cited; Wheeler vs. City of Cincinnati, 10 Ohio St., 19; Fisher vs. City of Boston, 104 Mass., 87.)

Adams, Judge, delivered the opinion of the court.

The case comes here on demurrer to the plaintiff's petition, which was sustained by the Circuit Court.

The suit originated in Pettis county, and was taken by change of venue to the Henry Circuit Court.

The petition alleges, that the defendant being a municipal corporation was authorized by its charter to establish fire companies in the city and to pass by-laws and ordinances to prevent and extinguish fires, and the petition further alleges, that the defendant did pass an ordinance establishing and regulating the fire department of the city, and under this ordinance one Isaac Graham was appointed chief engineer of the fire department, and accepted the appointment, and entered on the duties of office at a salary of seventy dollars per month, and that under the same ordinance one John B. Gallie was appointed chief of the Fire Department, and accepted the appointment, and duly qualified as such, and entered on the duties of his office. The petition further alleges, that the plain-

tiffs were the owners of a valuable brewery situated in said city, which with the contents was consumed by fire on th 25th day of March, 1869; and that their loss by fire amounted to thirty-one thousand dollars. The petition alleges, that the fire might have been extinguished by proper exertions on the part of the officers of the fire department; and further alleges, that the loss occurred by the negligence of the officers &c., of the fire department, and claims that the city was liable for such loss. In my judgment the demurrer was properly sustained to this petition.

It was not the intention of the Legislature, in conferring power on the city to establish a fire department, to render it responsible as an insurer for losses by fire. The power conferred was a legislative or discretionary power, which the city authorities might in their wisdom exercise or not. The creation of the fire department was not for the peculiar benefit of the corporation, but for the public. And the officers of this department, although appointed by the city, are public officers, and not agents of the city in the sense that renders the city liable for their acts or omissions of duty.

The doctrine of "*respondeat superior*" does not apply to this case, nor do the facts charged in the petition bring this within the numerous classes of cases, where a city is held liable for injuries in the construction of public works, or the neglect of some specific duty, such as keeping streets in repair, whereby damages result to travellers, &c. (Dill. Mun. Corp. § 774; Wheeler vs. Cincinnati, 19 Ohio St., 19; Patch vs. Covington, 17 B. Mon., 722; Brockmeyer vs. Evansville, 29 Ind., 187; Wrightman vs. Washington, 1 Blackf., 39.)

Let the judgment be affirmed. The other Judges concur.

FREDERICK SCHATTNER, Plaintiff in Error, *vs.* THE CITY OF KANSAS, Defendant in Error.

1. *Corporations, municipal—Streets—Changing grade—Damages—Liability.*—A city is not liable for the damages which may accrue to a property owner merely from a change in the grade of the streets.

2. *Kansas, City of—Charter—Establishment of grades of streets—Maps thereof—Change thereof—Liability to an individual.*—The Charter of the City of Kansas required the City Council, as soon as practicable, to establish the grades of all the streets in the City, to prepare and exhibit to public view a map thereof and thereafter only to change such grade after due public notice, etc. Held, that the City could not be held liable in damages at the suit of a private party for not obeying this provision of its Charter.

Appeal from Jackson Circuit Court.

Brown & Case, and Lay & Belch, for Plaintiff in Error.

The city could not act under one part of section 4, of their charter, avoid the other part, and escape liability occurring through their action. (City of Reading vs. Keppleman, 61 Penn. St., 233; Thurston vs. City of St. Joseph, 51 Mo., 510.)

J. Brumback & H. P. White, for Defendant in Error.

1. Under the Charter of 1867, Clause 8, § 1, the city had power to establish and change the grade of the streets.

2. From the importance and nature of the work, the Common Council had good reason to delay final action under Sec. 4 of Art. 8, and in the meantime had full and ample power to grade and regrade under Clause 8 of Sec. 1 of Art. 6. (City of Reading vs. Keppleman, 61 Penn. St., 233.)

3. The City cannot be held liable for damages accruing merely from the change of the grade of a street. (St. Louis vs. Gurno, 12 Mo., 415; Taylor vs. St. Louis, 14 Mo., 20; Hoffman vs. St. Louis, 15 Mo., 651. Dill. Mun. Corp. [1st Ed.] 782-3; *Id.* 741-2, and cases cited.)

4. The duty to establish a general system of grades was not of such absolute and perfect obligation as to render the City liable in damages for mere non-action.

NAPTON, Judge, delivered the opinion of the court.

The plaintiff in this case was the owner of a lot at the southwest corner of Main and 12th streets, in McGee's Ad-

dition to Kansas City. In May, 1868, intending to build on this lot, he applied to the City Engineer to set the grade for the corners of his house even with the level of Main and 12th streets. He avers in his petition, that this was the duty of the engineer, and that the grade of 12th and Main streets was then established at 169 feet above the city directrix, and that the engineer gave him the information requested, and he built his house accordingly. After his building was completed, the City altered the grade of Main and 12th streets at their intersection, lowering it to 165 feet above the city directrix—by which change the building is left four feet above the present grade, and for this his damages are claimed. He had presented his bill ($2,000) to the Mayor and Common Council, in February, 1870, but they declined to pay it.

The answer of the city is simply a denial of every allegation in the petition.

The petition was, by leave of Court, amended. In this amended petition it is alleged, that under the provisions of Section 4 of Article 8 of an act to incorporate Kansas City, approved March 12, 1867, it was the duty of the Common Council as soon as practicable to provide for the establishment, by the city engineer, of the grades of each and every corner or street within the limits of said city, and to require the city engineer to prepare perfect profiles of said streets, exhibiting the grade at the crossings and the elevation at all grade points; which profiles it was the duty of the Common Council to adopt, and then the engineer was directed to prepare a corrected diagram of the streets, exhibiting the gradation thereof—and this diagram was to be suspended in the office of the city clerk for public inspection; and this act and section further provided, that after said gradation was established no change could be made, except by ordinance passed by two-thirds of the council, and after due notice and publication in one of the daily newspapers.

The amended petition then avers that an ordinance was made in August, 1868, establishing the grade at the crossing of Main and 12th streets at 169 feet above the city directrix.

The petition then proceeds to allege his building on the grade pointed out by the engineer as in the original petition.

The plaintiff then proceeds to aver, that the Common Council wholly failed to follow the directions of Section 4, Article 8, of charter or amended charter of 1867; that they failed to have grades established; that no profiles were made; that no connected diagram was prepared and exhibited in the office of the city clerk as by law was required.

The plaintiff then states, that by the provisions of said Section 4, of said act of March 12, 1867, defendant became liable to pay all damages sustained by any one by reason of a change of grade, and that he presented his claim to the Mayor, etc.

The answer of the defendant to this amended petition sets up argumentatively the defense of the city. It insists that the ordinance changing the grade of Main street, approved February 8th, 1869, was not passed by reason of any authority under Section 4 of Article 8, but was adopted under Section No. 1 of Article 6, of the charter, which provided, that said Common Council should have power "to alter, open, widen, extend, straighten, establish, regulate grades, regrade, clean, or otherwise improve, the streets," and that the change in the grade of Main street in front of plaintiff's property was lawful, that the Common Council never required their engineer to make out a perfect profile of streets and their grade under section 4; that it was impracticable, and that plaintiff has not been injured thereby.

There was a replication, denying that the Common Council had any discretion as to their duty in carrying out the provisions of Section 4, and denying that there was any difficulty in so doing.

The evidence in the case is not necessary to be noticed. The court gave these instructions:

1. The defendant is entitled to judgment on the pleadings.

2. The defendant is not liable in this action because of failure to exercise the power conferred by Section 4, Article 8, of the charter of 1867.

3. If plaintiff improved his land and built his house without first requiring or compelling defendant to act under Section 4, Article 8, of the charter of 1867, the court must find for defendant.

It seems from the evidence and pleadings in this case, that in the charter of Kansas City there is a provision requiring the municipal authorities to have a general street grade established so soon as was practicable, and to require their engineers to make out a map or profile of said streets, showing the gradation, and a further provision that when this was done the council could not change the grade without a vote of three-fourths, and that any damage resulting from a change of grade should be paid for by the city.

It seems from the evidence and pleadings that this direction in Section 4, Article 8, of the charter of 1867, was never complied with by the municipal authorities, that no general grade of streets, or profile by the city engineer, was ever established under this section.

It appears, that a change was made by the municipal authorities in the grade of 12th street under the general power to alter streets conferred in the charter—and by this change plaintiff's house was left four feet above the street. The plaintiff claims damages, because he applied to the city engineer and built his house in accordance with the grade that was established at that time, and because the change in the grade, established afterwards, put his house four feet above the street.

It is conceded that Section 4, Article 8, of the charter was never complied with, and the liability of the city depends on either the fact of not carrying out in a practicable time said provision, or on the principle that the city is liable for changes in the grade of streets which occasion damage to lot holders.

The last position which assumes the general liability of the city for changing the grade of streets is untenable, as has been decided by this court in Gurno vs. St. Louis, 12 Mo., 415, and several other cases, in accordance with decisions in

Massachusetts, New York, Pennsylvania, Indiana, Rhode Island, Louisiana, Georgia, Illinois, Tennessee, Maine, Connecticut, Iowa, Mississippi, and the Federal Courts. (Dill. Mun. Corp., § 786 and note.)

The duty of the city to execute the power confided to it by Section 4, Article 8, of the charter could not be investigated in this action. The provision is certainly a just and prudent one, and if faithfully carried out would prevent litigation and do justice to lot holders, but we cannot say that a general grade of streets in 1868 was practicable. This was left by the Legislature to the city authorities, and they declined to act. It is conceded by the pleadings, that the city authorities did not establish the grade, of which plaintiff complains, under Section 4, of Article 8 of the charter, and their failure to do so is one of the grounds of the claim. This section of the charter prescribed a mode of ascertaining the damages in such case which is not followed here.

Judgment affirmed. The other Judges concur. Judge Adams not present.

FRANKLIN COOLEY, *et al.*, Respondents, *vs.* DANIEL W. WARREN, *et al.*, Appellants.

1. *Conveyance—Land—Description of property—Repugnancy*—Whenever material or permanent objects are embraced in the calls of a survey or deed, these have absolute control, and a call may be rejected for inconsistency, when description enough still remains to ascertain and describe the land with certainty.
2. *Estoppel—Privies.*—Privies in blood, in estate, or in law, are estopped from litigating that which is conclusive upon him with whom they are in privity.

Appeal from the Court of Common Pleas of Lafayette County.

Wm. T. Wood, for Appellants.

I. The description in the deed is so contradictory and uncertain, that neither the court, nor defendants can know what

specific land is sued for, nor where it lies. (McClean vs. Martin, 45 Mo. 393.)

II. There was a misdescription and no title passed. (Hartt vs. Rector, 13 Mo. 505.)

III. A judgment or decree can only bind parties and privies. (1 Starkie, 186, 191–2.) Defendant holds by purchase at execution sale, and had no notice, actual or constructive. (Young vs. Coleman, 43 Mo. 183; Chapman vs. Chapman, 16 Munford, 398; Wood vs. Davis, 7 Cr. 271.)

IV. Calls for natural objects and fixed and permanent monuments do not prevail over corners, and as applied to this case over government corners. (Clark vs. Campbell, 6 Mo. 219.)

Wallace & Mitchell, for Respondents.

I. *Falsa demonstratio non nocet*, if the instrument defines, with convenient certainty (what is intended to pass by it, and may be rejected. (2 Wash. Real Est. (2nd. Ed.) 670–675; 3rd. Ed. *Id.*, vol. 3, 343, 344, 347, 352; 4 Kent's Com. (6th. Ed.,) 466, 467; Evans vs. Greene, 21 Mo. 170; Page vs. Scheibel, 11 Mo. 167; Fenwick vs. Gill, 38 Mo. 510; Hardy vs. Matthews, 38 Mo. 121; Shelton vs. Maupin, 16 Mo. 124; Bates vs. The Bank of Mo., 16 Mo. 309; Bank of Mo. vs. Bates, 17 Mo. 583; Riggs vs. Myers, 20 Mo. 239; McGill vs. Somers, 15 Mo. 80; Webster vs. Blount, 39 Mo. 500; Kronenberger vs. Hoffner, 44 Mo. 185; Nelson vs. Bodhack, 44, Mo. 596; Shultz vs. Lindell, 40 Mo. 330; Gibson vs. Bogy. 28 Mo. 478.)

II. The defendants were privies in estate and in law with Crump, who was a party to the suit in which the decree was rendered.

WAGNER, Judge, delivered the opinion of the court.

In this case, notwithstanding the lengthy and voluminous record, the issues presented for our consideration are narrowed down to a small compass. The only distinct ground set forth in the motion for a new trial, relates to the action of the court in its ruling on the admissibility of testimony. The action

was ejectment to recover the possession of certain premises, and both parties claimed under a common grantor as the original source of title. If the plaintiff's title was good, it constituted the prior and the better one. The land in controversy belonged to one Ewing, who borrowed money from Lafayette County, and executed a mortgage thereon to secure its payment. Default being made in the payment of the mortgage debt, the land was sold and the county became the purchaser. Subsequently the county sold and conveyed the same to the plaintiff, whose deed was lost or destroyed before the commencement of this suit. In Ewing's mortgage the land was improperly described, and the sale and conveyance by the county to the plaintiff was by the same description. Plaintiff instituted a suit in the nature of a proceeding in equity to reform the description in the deed, and to obtain a decree for title, for the purpose of supplying the lost or destroyed conveyance. Upon a full hearing of the case the court found in his favor, and granted him a decree. This decree was admitted in evidence in the present suit against the objections of the defendants, and this ruling constitutes the principal error complained of in the motion for a new trial. There was evidently a misdescription in the land, but this applied only to the starting point. Several surveyors were sworn as witnesses in the present trial, and they all testified that there was no difficulty in locating the land from the description contained in the deed, but that the first call would have to be rejected. The first or starting point was surely a mistake, but all the rest of the description was by natural objects, and fixed and permanent monuments, so as to leave no doubt whatever as to the true location. Strike out the first or inconsistent call, and enough still remains to designate the land with certainty. The rule is clearly established, that whenever natural or permanent objects are embraced in the calls of a survey or deed, these have absolute control, and that a call may be rejected for inconsistency or repugnancy, where description enough still remains to ascertain and describe the land with certainty. (Brown vs. Huger, 21 How. 306; Fenwick vs. Gill, 38 Mo.

510; Rutherford vs. Tracy, 48 Mo. 325; 2 Greenl. Cruis. Real Prop. 307. n. 1.)

It is undoubtedly true, that strangers to a certain decree or judgment are not bound by them, and that they are admissible in evidence only against those who were parties to the proceedings. But in the term, "parties who are concluded or bound by a judgment or decree," is included all persons who are represented by the parties, and claim under them or in privity with them. Greenleaf says, the ground upon which persons standing in this relation to the litigating party are bound by the proceedings, to which he was a party, is that they are identified with him in interest; and wherever this identity is found to exist, all are alike concluded. Hence all privies, whether in estate, in blood, or in law, are estopped from litigating that which is conclusive upon him with whom they are in privity. (1 Greenl. Ev. § 523.) Whilst the defendant here, who makes the objection, was not a party to the decree, yet he was privy in estate, and held under one of the defendants in the decree, and is therefore bound by the same. It results therfore, that the Court committed no error in receiving the decree in evidence. No point is made in reference to the instruction in the motion for a new trial, nor in regard to the capacity of the county to purchase lands, and they will consequently not be considered.

I have seen no such error as would authorize a reversal. Let the judgment be affirmed. All the Judges concur, except Judge Napton, who did not sit in the case.

JAMES BRAY, Defendant in Error, *vs.* R. J. RAGSDALE, *et al.*, Plaintiffs in Error.

1. *Lands and Land Titles—Pre-emption Claims—Interest in Lands.*—A pre-emption claim constitutes no interest in lands.
2. *Sheriff's Sales—Pre-emption Claims.*—A pre-emption claim cannot be levied on and sold on execution.

Error to Green Circuit Court.

W. C. Price & Wright, for Plaintiffs in Error.

An improvement on public lands is not subject to an execution sale. (Hatfield vs. Wallace, 7 Mo., 112.) A pre-emption, until accepted by proof of the pre-emption and payment of the money, amounts to nothing more than an improvement on the public lands. The plaintiff acquired nothing by his purchase on execution, the privilege of the pre-emption being personal. (Bowen vs. Higbee, 9 Mo., 256; Davenport vs. Farrar, 1 Scamm., 314; Rasor vs. Qualls, 4 Blackf., 286.)

Baker & Ellis, for Defendant in Error.

This was a Railroad pre-emption proved up, and defendant in actual occupation of land at time of sale by the Sheriff on execution against the defendant. Such pre-emption was an "interest in land." (W. S., 605, 606, §§ 16, 18; *Id.* 558, § 2. Thregdill vs. Pintard, 12 Howard, 36; Pierson vs. David, 1 Iowa, 23; Allison vs. Hunter, 9 Mo., 741; Waller vs. Von Phul, 14 Mo., 87. Sess. Acts 1858–9, p. 65, § 6.)

WAGNER, Judge, delivered the opinion of the court.

This was an action of ejectment to recover the possession of certain lands which the plaintiff purchased at Sheriff's sale, as the property of the defendant. The land constituted a part of the grant made by the government of the United States to the State of Missouri, and which are commonly known as railroad lands; and defendant pre-empted the same under the laws of this State.

The principle question to be first considered, is: Was the defendant's pre-emption such an interest in land as could be

sold under execution? The law conferring the right of pre-emption declares, that all pre-emptions under that or any former law shall be transferable; and the person purchasing any pre-emption shall have the same right to enter as the original pre-emptor had, by first obtaining in writing all the right of the pre-emptor, acknowledged before some justice of the peace, and duly certified by the Clerk of the Circuit Court in the county where the land lies. (Sess. Acts. 1858-9, p. 65, § 6.)

The statute makes vendible under execution all real estate whereof the defendant, or any person for his use, was seized in law or equity at the time of the rendition of the judgment, whereon execution issued, or at any time thereafter. (1. W. S., p. 605, § 16.)

That the act of the Legislature, giving the privilege of pre-emption, clothes it with the character of transferability, does not necessarily impart to it such an interest as would make it subject to sale on execution.

The settled doctrine for many years has been that a pre-emption claim constitutes no interest in lands.

In the case of Bower vs. Higbee, (9 Mo., 256,) Judge Scott, writing the opinion of the court, uses this language: "What is a pre-emption right. Is it any interest in the land? Is it certain that the party entitled to it will ever avail himself of it? Until he does there is certainly no surety that he ever will acquire any right. What if a person entitled to a right of pre-emption should die before proof of his right, will it descend? A pre-emption is nothing but an offer by the Government to an individual settled upon the public lands, which he may or may not accept. The circumstance, that the period has not arrived when the acceptance can be signified, makes no difference. That he will accept may be presumed, but still an absolute certainty that he will accept, when the time for acceptance comes, will not confer any right, until an acceptance is actually signified in the manner prescribed by law."

A person settling upon the land under a pre-emption, evi-

dently gets no title, till he has complied with the conditions of the law. If he fails to comply, then certainly he has no right. Till the time arrives when he signifies his acceptance, he surely is not seized, either in law or equity, of any interest or title in the land. Till he fulfills the prescribed conditions of the law, the title remains in the government. He may abandon the pre-empted lands at any time, and then there could be no pretext that he had either a legal or an equitable seizure.

The cases of Thredgill vs. Pintard, (12 How., 36), and Pierson vs. David, (1 Iowa, 23), cited by the respondent's counsel, do not militate against the views above announced. These cases decide, that where a person upon the public lands has a pre-emption right to them, and sells them to another party, the original vendor has a lien upon the land for the purchase money due, and can enforce it in chancery, notwithstanding the vendee has procured a patent in his own name.

But it will be perceived in the above cases, that the title was consummated, and the court merely interfered to adjust the equities between the parties.

The case here, however, is widely different. Here there are no equities, and the claims may never ripen into a title of any character.

I think that the court erred in holding that defendant possessed such a title as might be sold on execution, and the judgment will be reversed.

Judges Vories and Napton concur. Judges Adams and Sherwood not sitting.

CHARLES MCCLURE, Respondent, *vs.* J. W. MCCLURG, Appellant.

1. *Sheriffs' deeds—Acknowledgment, certificate of—Extrinsic evidence.*—The certificate of acknowledgment by a Sheriff to a deed must be within and of itself complete, and no extrinsic evidence can be invoked to eke out its recitals. [Samuels vs. Shelton, 48 Mo., 444.]

2. *Sheriff—Deeds—Acknowledgment—Open court—Informality.*—An acknowledgment of a deed by a Sheriff, certified to by the Clerk of Court and stated by him to be entered of record in the records of said Court, is not invalidated because stated to be taken before the judge. It is evident that the clerk used the words "Judge of the Court" as synonymous with "Court," and it may be regarded as a mere informality.

Appeal from Greene Circuit Court.

J. S. Phelps, for Appellant, relied on Allen vs. King, 35 Mo., 216; Scruggs vs. Scruggs, 41 Mo., 242; Ryan vs. Carr, 46 Mo., 483; Adams vs. Buchanan, 49 Mo., 64; Payne vs. Collier, 6 Mo., 321.

J. P. Ellis, for Respondent.

I. This acknowledgment was taken, according to its terms, before "the Judge of the Greene Circuit Court" and not before the court itself, as is required. (W. S., 612, §§ 55, 56.)

II. The record of acknowledgment made by the Circuit Clerk cannot be introduced to sustain the deed. (Samuels vs. Shelton, 48 Mo., 444; Allen vs. King, 35 Mo., 225; Scruggs vs. Scruggs, 41 Mo., 242; Ryan vs. Carr, 46 Mo., 484; Adams vs. Buchanan, 49 Mo., 64.)

SHERWOOD, Judge, delivered the opinion of the court.

Action of ejectment brought in the Greene Circuit Court by Charles McClure against J. W. McClurg. Petition and answer in usual form.

Both parties claim under John Thurman, as the common source of title. The plaintiff read in evidence a deed from Thurman to Samuel Prophet, dated July 17th, 1867, for the land in controversy, and also a deed for the same land, from Prophet to the plaintiff.

The defendant offered to read in evidence a deed to him-

self for the land sued for from the Sheriff of Greene county, dated September 1st, 1863, reciting a judgment recovered against Thurman, the common source of title, the issuance of execution, the levy of the same on said land, and the sale of the land to defendant after due advertisement, etc., etc.

The plaintiff objected to the introduction of this deed in evidence, on the ground, that it had not been acknowledged in open court.

The certificate of acknowledgment was in this form:

STATE OF MISSOURI, } ss.
County of Greene, }

Be it remembered that on this 3d day of October, 1863, personally appeared before the Judge of the Greene Circuit Court of Greene county, Missouri, Thomas A. Reed, Sheriff of said county, and acknowledged that he executed the foregoing deed as Sheriff aforesaid, for the uses and purposes therein contained, which said acknowledgment is entered on the records of said court of said date, in record book "F," page 222.

In witness whereof, I, M. J. Hubble, Clerk of said court have hereunto set my hand and seal, this 3d day of SEAL October, A. D., 1863.

M. J. HUBBLE, Clerk.

By E. M. HENDRICK, D. C.

The defendant then offered in aid of such deed the record of the Greene Circuit Court, showing that the deed had been acknowledged by the Sheriff in open court, which record entry was in the usual form. The court refused to permit the deed, and the entry of its acknowledgment, to be read in evidence, and defendant excepted, and judgment being given for the plaintiff the defendant, after moving unsuccessfully for a new trial, brings this cause here by appeal.

There was no error in refusing to admit the record in aid of the certificate of acknowledgment. The certificate, as its very name imports, must be within and of itself complete, and no extrinsic evidence can be invoked to eke out its recitals. This was so held in Samuels vs. Shelton, 48 Mo., 444.

It only remains to pass upon the sufficiency of the certificate of acknowledgment, now before us. In the case just cited the certificate, among other things, recited that the sheriff "executed and delivered a deed to David Malanix," and it was there held that the phrase "a deed" was a mere clerical error or inadvertence; that the certificate evidently referred to the deed on which it was indorsed, and that no mere informality should be permitted to invalidate it. Let us apply here the rule there enunciated. In the present instance it is sufficiently plain, that the clerk in using the expression "judge of the Greene Circuit Court" regarded and used judge and court, as synonymous terms; this is evident from the fact, that the residue of the certificate is in the usual form; is not signed by the judge, but is signed by the clerk, is authenticated by the seal of the court, and states that the "acknowledgment is entered on the records of said court of said date," giving book and page.

In view of all these circumstances I think it would be going a great way to hold that this acknowledgment was privately taken, either before the judge or the clerk, and was therefore inadmissible. It would be a ruling fraught with great danger to those whose titles depend on judicial proceedings, to hold that these certificates should be construed with strict regard to the very letter of the law, and rejected as inadmissible whenever they fail to come up to the hypercritical requirements of technical nicety.

Though obviously informal, I regard the certificate as sufficient. For these reasons the judgment will be reversed and the cause remanded.

The other Judges concur.

THE KANSAS CITY HOTEL COMPANY, Respondent, *vs.* JOSEPH SIGEMENT, Appellant.

1. *Practice, civil—Pleadings—Counts—Separate causes of action—Account.*—Several assessments on a stockholder of a company in payment of his subscription, after they all become due, are in the nature of an account made at several times, all of the items of which being added together make a single cause of action.

2. *Practice, civil—Motion in arrest—Errors in pleadings—Improper joinder—Supreme Court.*—The objection, that several causes of action are united in one count, will not be considered by this court, unless that point was raised before the lower court in the motion in arrest.

Appeal from Kansas City Court of Common Pleas.

F. A. Mitchell, and Johnson & Botsford, for Appellant.

I. The petition contains but one count in which are commingled four separate and distinct causes of action. (Kansas City Hotel Co. vs. Harris, 51 Mo., 464.)

II. The finding and judgment are both a part of the record, and, even had there been no motion in arrest, a single finding of one entire gross sum, where there are several causes of action stated in the petition, would be bad on appeal, or writ of error; as it would be an error apparent of record. (Bateson vs. Clark, 37 Mo., 31; State vs. Matson, 38 Mo., 489; Hoppe vs. Stone, 39 Mo., 378.)

Brown & Case, and Lay & Belch, for Respondent.

I. The subscription of defendant is a contract. (Ang. and Ames Corp., § 517.)

II. His entire liability arises on this contract, and all debts or demands, already due by the same contract, make but one entire demand or cause of action. (19 Wend., 207; 16 N. J., (Ct. of App.) 548; Callaghan vs. McMahon, 33 Mo., 111; State to use DeHaven vs. Davis, 35 Mo., 406.)

ADAMS, Judge, delivered the opinion of the court.

The defendant subscribed ten shares to the capital stock of plaintiff, which amounted to one thousand dollars; each share being one hundred dollars. The subscriptions to the stock were to be paid on calls to be made by the board of directors.

The first call was ten per centum, which was paid by the defendant. The board of directors afterward made four more calls, as follows:

2nd. Call of ten per cent. made May 4, 1868, payable on or before May 15, 1868.

3rd. Call of ten per cent. made June 8, 1868, payable on or before June 16, 1868.

4th. Call of fifty per cent. made December 15, 1868, payable December 21, 1868.

5th. Call of twenty per cent. made June 4, 1869, payable June 7, 1869.

All these calls having become due, amounted to the aggregate sum of nine hundred dollars. The plaintiff brought this suit for these four calls aggregating nine hundred dollars, and joined them together as one cause of action in a single count.

The petition sets forth the calls as made, alleging that they are all due, and asks judgment for the whole amount.

There was a general verdict and judgment rendered in favor of the plaintiff for the whole amount.

The objection urged here, is that there should have been separate findings or verdicts on each call. This objection is not tenable. It is very true, that each call, as made, was a distinct and separate cause of action, and might have been sued on as such. But after all the calls had been made and become due, they were added together and the aggregate amount treated as a single indebtedness of nine hundred dollars. They were in the nature of an account made at several times, all the items of which being added together make a single cause of action. Besides the motion in arrest does not raise this point, and it was not presented to the court below and is not, therefore, properly before this court. (Newton vs. Miller, 49 Mo., 298.)

Let the judgment be affirmed. The other judges concur.

JNO. LEE, Plaintiff in Error, *vs.* THE TEBO & NEOSHO RAIL ROAD CO., Defendant in Error.

1. *Railroads—Lands, condemnation of—Commissioners—Report, motion to set aside—Review.*—In proceedings to condemn lands for railroad purposes, the proceedings being regularly conducted, the opinion of the commissioners on the facts submitted to them, and also the propriety of the instructions or declarations of law asked on a motion to set aside the report of the commissioners, cannot be examined into, nor reviewed in this court.
2. *Railroads—Lands, condemnation of—Commissioners, order of reference to—Review.*—In proceedings to condemn lands for railroad purposes, the propriety of the order appointing the commissioners which contained their instructions, is subject to examination by this court.
3. *Railroads—Lands, condemnation of—Benefits, what are.*—When lands are condemned for railroad purposes, the benefits to be assessed to the owner, with reference to the remainder of his land, are such as his land derives from the road over and above the benefits to his neighbors, whose land is not taken.

Error to Howard Circuit Court.

Hayden & Tompkins, for Plaintiff in Error.

I. The commissioners had no right to consider any advantage that was not special to the land to be condemned; and they had no right to off-set special dis-advantages by general advantages. (49 Mo., 165.)

S. C. Major, Jr., for Defendant in Error.

I. The motion to set aside the report of commissioners is addressed to the court. Instructions in such a case are not proper, and the refusal of them cannot be assigned for error. (Conran vs. Sellew, 28 Mo., 320; Parker vs. Waugh, 34 Mo., 340.)

NAPTON, Judge, delivered the opinion of the court.

This was a proceeding under sections 9 and 10 of the charter of the Tebo and Neosho R. R. Co., (Jany. 16th, 1860,) to condemn land of Lee, the plaintiff in error, in Howard county, over which the said road was laid out.

The Judge of the Circuit Court appointed commissioners, and in the order they were directed to report "the damages done to the land, or any improvements thereon, by reason of the location of said road, taking into consideration the value of the lands, and the advantages and disadvantages of the

road and its appurtenances." The commissioners reported nominal damages merely, and, upon the return of the report, Lee made various objections, and his counsel asked several instructions as to the law, all of which were refused. There is no objection to the regularity of the proceedings, nor can this court undertake to review the action of the court in refusing instructions upon the motion to set aside the report.

It appeared from the report of the commissioners, that the road ran through Lee's enclosures diagonally, leaving about 60 acres detached from the main body of his farm; that his land was worth $50 per acre; that the injury to the triangular strip cut off by the railroad, was about $300; that 11 20-100 acres were taken for the road; that a depot of the road was located about 400 yards from Lee's house, but not on his land, and that his house was about 300 yards from the Missouri river.

The opinion of the commissioners on the facts, we have no power to examine, nor is the propriety of the instructions, or declarations of law asked, a matter of review, as they were asked upon a motion to set aside the report. But the propriety of the order, which contained the instructions to the commissioners, is properly before us, and presents the only question in the case.

This subject was considered by this court, and determined in several cases. (Newby vs. Platt Co., 25 Mo., 258; Lou. & P. R. R. Co. vs. Pickett, *Ibid*, 535; N. M. R. R. vs. Lackland *Ibid*, 515; Garrett vs. City of St. Louis, *Ibid*, 505; Pacific R. R. vs. Crystal, *Ibid*, 544.)

The conclusion of the court in these cases seems to have been acquiesced in here, although contrary opinions have been maintained with much ability by courts elsewhere, and by elementary writers. This conclusion was, that the commissioners or jury (as the case might be) in estimating benefits, should be restricted to such peculiar and direct benefits or increase of value, as result to the land not taken for the road, in which other lands in the neighborhood do not participate. The advantages to be considered by the commissioners, are such as particularly and exclusively affect the particular land, a por-

tion of which is condemned; and are not advantages of a general nature, which the owner in common with his neighbors, whose lands are not taken, derives from the improvements. (Garrett vs. City of St. Louis, 25 Mo., 505; Lou. & F. P. R. Co. vs. Pickett, *Ibid*, 535.)

The order to the commissioners in this case does not conform to this view of their duty, or rather it fails to explain what benefits they should consider. The intrinsic value of the land condemned, and the injury to the remainder of the land by the road, seem to have been admitted to be not less than eleven hundred dollars, and the commissioners must have estimated the advantages to Lee at about the same amount. Whether they understood that these advantages must be restricted to such as he derived from the road, over and above his neighbors, whose land was not taken, does not appear. It has been suggested, that we ought to reverse and overturn the rule we have referred to, and allow the land-owner to get the price of his land without regard to benefits. There are, no doubt, cogent reasons, and respectable authority to justify such a decision, but we prefer to stand by what is manifestly the established doctrine in this State.

The judgment will be reversed and the cause remanded, with the concurrence of the other Judges.

Judge Adams, having been of counsel, did not sit in this case.

STATE OF MISSOURI, Appellant, *vs.* R. B. GRISWOLD, Respondent.

1. *Statute, construction of—Bigamy—Apprehension—Indictment—Allegation—Jurisdiction.*—When a Court acquires jurisdiction in an indictment for bigamy only by virtue of the arrest of the prisoner within the limits of its jurisdiction, [W. S., 499, § 4,] the indictment must allege the apprehension of the prisoner within the limits of said jurisdiction prior to the finding of the indictment.

Appeal from Greene Circuit Court.

H. Clay Ewing, Attorney General, for Appellant.

I. If it be necessary in a case like this to charge in the indictment the county where the offender was apprehended, it would be impossible to indict any one until he should have been first arrested for the offense.

O'Day, Ellis & Cravens, for Respondent.

I. The defendant must have been in custody in Greene county at the time of the finding of the indictment, and the indictment is fatally defective in not averring that fact. (1 Rus. Cr., 189; 2 Bish. Cr. Pr., §§ 880, 882; 1 *Id.*, § 78 (note 4); 2 Arch. Cr. Pr., and Pl., 1025 (note); Whart. Pr. Indict. 985 and note.)

WAGNER, Judge, delivered the opinion of the court.

The defendant was indicted by the Grand Jury of Greene county for the crime of bigamy.

The indictment charges, that defendant in October, 1863, in the State of New Jersey, married one Matilda Cosgrove, and that he afterwards left her and went to Wisconsin, where in March, 1870, his wife being still alive, he married Julia Harrington, and after he had married her, they both removed to the county of Laclede, in the State of Missouri, and there cohabited together.

Upon this indictment a *capias* issued, and the defendant was arrested on the same for the first time in Greene county. Upon being brought into court, the defendant moved to quash the indictment, because:

First—The indictment did not charge either of the marriages to have taken place in this State, nor that the defendant and Julia Harrington cohabited together in Greene county.

Second—That it was not charged, that the defendant had been arrested, detained, or apprehended in Greene county; and

Third—That it was not charged, that any crime had been committed in Greene county, and that it did not appear that the Greene Circuit Court had any jurisdiction of the case.

The motion was by the court sustained, and the State appealed.

As to the first point the Statute provides, that persons committing bigamy in another State, and afterwards removing and cohabiting in this State, may be punished in the same manner as if the crime were originally committed here. (W. S., 499, § 3.)

But the 4th Section of Article 8, respecting crimes and punishments, says "that an indictment for bigamy, as defined in the preceding sections, may be found, and proceedings, trial, conviction, judgment and execution theron had, in the county in which such second or subsequent marriage or the cohabitation shall have taken place, or the county in which the offender may be apprehended."

As the indictment charged, the cohabitation was committed in Laclede county, the Circuit Court of Greene county had no jurisdiction unless it obtained it by the apprehension of the defendant.

The Statute, in speaking of the county in which the offender may be apprehended, means that he shall be apprehended, or held in custody, prior to the finding of the indictment. Our statute is copied mainly from an English statute on the subject, and similar statutes exist in other States, and the construction has been uniform, that there must be a previous apprehension before indictment, and that fact must be alleged in the indictment.

Archibald in his treatise on Criminal Pleading and Evidence (10th Lond. Ed., p. 629), sets out the form of an

indictment, in which the direct averment of apprehension or custody is made, and then adds: "The averment of the prisoner's apprehension is only necessary where the second marriage did not take place in the county where the defendant is indicted; but in such case it has been held to be essential. (Rex vs. Fraser, 1 Moody, 407). So it was held also by a majority of the judges, that where the indictment is found in a different county from that in which the offense was committed, it must allege that the prisoner was in custody, at the time of the finding of the inquisition, in the county of the finding." (Reg. vs. Whiley, 2 Moody, 186.) See also as to the indictment, Whart. Pr., 2 Ed., p. 985, *et seq*; Train & Heard Pr., 439, *et seq*; 2 Bish. Cr. Pr., §§ 880–81–82.

The offense charged was committed in Laclede county, and the only way in which the court in Greene county could obtain jurisdiction over the person of the defendant, was by his being apprehended and held previous to the time of finding the indictment.

The judgment must be affirmed. The other Judges concur.

———o———

CHAS. W. FREEMAN *et al.*, Respondents, *vs.* JOHN THOMPSON, *et al.*, Appellants.

1. *Practice, civil—Notice—Publication, order of—Sufficiency of.*—An order of publication, informing defendant that a suit had been commenced against him, founded on an account for the sum of $150, is a sufficient compliance with the statute.
2. *Courts, Circuit, records of—Verity of, assailed collaterally.*—The verity of the records of the Circuit Courts cannot be impeached collaterally.
3. *Statute, construction of—Circuit Court of Polk County—Change of terms—Return of writs.*—The act of Jan. 26, 1864, changing the time of holding the Polk Circuit Court, did not require the writs already issued to be returned for correction as to the time of holding court, but made such writs returnable by force of the law to the substituted terms of court.
4. *Attachment, suits by—Courts—When jurisdiction acquired.*—In attachment causes, the jurisdiction over any given subject matter is obtained by a levy thereon of a writ properly issued. [Hardin vs. Lee, 51 Mo., 241, affirmed.]

Appeal from Polk Circuit Court.

John S. Phelps, for Appellants.

I. The Legislature, by act of Jan. 26th, 1864, changed the time of holding courts in Polk Circuit, and made "all writs, process and proceedings returnable to the substituted terms." The Legislature had the right so to enact. (Carson vs. Walker, 16 Mo., 68.)

II. In attachment causes, it is the levy of the attachment on property which gives the court jurisdiction. (Hardin vs. Lee, 51 Mo., 241; Drake Att., §§ 437, 448; Porter vs. Partee, 7 Humph., 168; Beach vs. Abbot, 6 Vern., 586; Williams vs. Stewart, 3 Wis., 773; Paine vs. Mooreland, 15 Ohio, 435; Cochran's Heirs vs. Loring, 17 Ohio, 409; Voorhies vs. Bank of U. S., 10 Pet., 449; Cooper vs. Reynolds, 10 Wal., 308; 1 Smith's L. Cas., §§ 1015, 1016.)

III. Proceedings of superior tribunals must be presumed to be correct unless manifestly erroneous, and cannot be contradicted or convicted of error by extrinsic evidence. (1 Smith's L. Cas., § 995; Cooley's Court Lim., §§ 406, 407, 996, 997, 998; Wilcox vs. Kassich, 2 Mich., 165; McCarthy vs. Marsh, 1 Seld., 263; Watson vs. Jackson, 10 Mo., 329; Montgomery vs. Forley, 5 Mo., 233.)

IV. When facts necessary to give a superior court jurisdiction are set forth in the record, they cannot be contradicted in collateral proceedings. (1 Smith's L. Cas., §§ 996, 997; Newman case vs. City of Cincinnati, 18 Ohio, 323; Granger vs. Clark, 22 Me., 128; Cook vs. Darling, 18 Pick., 393.)

Wright & Johnson, for Respondents.

I. The order of publication in the case of McClurg vs. Freeman is wholly insufficient, and is no notice to the defendant; and the judgment being rendered without notice is void.

II. After the time of the holding of the Circuit Court had been changed, the notice was published to appear at the former time of holding court, and judgment by default was taken against defendant at a day prior to that he was notified to appear. Such notice was void.

III. In attachment cases the court must get jurisdiction of the person as well as the thing, by notice, or the proceeding is void. (Thatcher vs. Powell, 6 Wheat., 119; Bloom vs. Burdick, 1 Hill, 140. *et seq.;* Sherwood vs. Reade, 7 Hill, 433; McNair vs. Biddle, 8 Mo., 257, 264; Fithian vs. Monks, 43 Mo., 502.)

IV. The affidavit of the printer of the publication of the notice in attachment is not conclusive. It is a jurisdictional fact, and the record does not say that the necessary fact was found proven. (2 Phil. Ev., Hill and Edw. notes, p. 157, and cases above referred to.)

Sherwood, Judge, delivered the opinion of the court.

Action of ejectment brought in the Circuit Court by Freeman and others against Thompson and others for a lot of ground in the town of Bolivar. Petition and answer in usual form. The cause was tried by the court, a jury having been waived, and defendants admitted, that Thos. W. Freeman, deceased, was the owner of the lands described in the petition; that he died in October, 1865, and that plaintiffs were his only heirs at law. The plaintiffs thereupon rested. The defendants to maintain the issue on their part then read in evidence, without objection, a deed to defendants, Lunceford and Viles, dated September 26th, 1865, from John Caldwell, sheriff of Polk county, reciting the issuance of a writ of attachment on the 22nd day of October, 1865, by the clerk of the Circuit Court of said county, in favor of Jos. W. McClurg, and against Thomas W. Freeman, and the levy on the next day of the writ on the lot as the property of said Freeman, and as described in the petition, (except that the names of the town, county and State are omitted,) and recovery of judgment on the 31st day of March, 1865, by the said Jos. W. McClurg against Thomas W. Freeman for the sum of, etc., and the real estate attached, ordered to be sold; the issuance of a special *fi. fa.* on said judgment in favor of "said Jos. W. McClurg," and against Thomas W. Freeman, and the sale under that special execution of the property, previously mentioned as hav-

ing been attached, to Lunceford and Viles, two of the defendants, after due notice, etc., on the 25th day of September, 1865, and defendants rested.

The plaintiffs then, but for what purpose is not stated, read in evidence the records and files of the Polk Circuit Court in the case of Joseph W. McClurg vs. Thomas W. Freeman, showing the filing of the petition as well as the affidavit and bond for an attachment at the October term, 1863, of said court, the approval of said bond, the ordering of a writ of attachment to issue and publication to be made, notifying Thomas W. Freeman that an action had been commenced against him "founded on an account for the sum of $150;" that his property had been attached, etc., and requiring him to appear at the next March term, commencing on the 5th Monday after the 2nd Monday in March, 1864, and answer the action. The petition, affidavit, bond and writ were in usual form, and "Joseph W. McClurg" was the only party plaintiff mentioned therein. The writ of attachment is of the same date as that described in the sheriff's deed, and the property, (among other) mentioned in the return indorsed on the writ, corresponds in every particular with the property sued for.

Among the files in said cause, and attached thereto, was an affidavit, annexed to the printed order of publication in the said cause, which affidavit purported to be made by J. W. D. L. F. Mack, of the firm of Boren & Mack, publishers of the Springfield Journal, (the paper in which the publication was ordered to be made,) and stated that the publication was made in said paper for four weeks successively in Nos. 38, 39, 40, 41 of vol. two of that paper, and dated February 9, 16, 22 and 28, 1864. The notice of publication above referred to was in accordance with the order of court before mentioned. The interlocutory judgment in the cause showed, that court convened at Bolivar on the 28th day of March, 1864; that on 5th day of the term, "it appearing to the full satisfaction of the court that the defendant had been duly notified of the commencement of this action by publication in the Springfield Journal, a weekly newspaper published in Greene coun-

ty, Missouri, for four weeks, the last insertion being at least four weeks before the first day of the present term of this court, and defendant having failed to plead, answer, or demur to plaintiff's petition, the same is taken as confessed, etc."

The final judgment refers to the default taken against the defendant, and orders a special *fi. fa.* to issue for the sale of the property attached, and the special execution conforms to the sheriff's deed in the description of the property, and contains the same omission as the deed, as to name of town, county and State, but refers to the property as having been attached on the 23rd of October, 1863, (in which attachment return the property is correctly described,) and the return on the special *fi. fa.* shows the sale of the property to Viles and Lunceford as described in the sheriff's deed.

The defendants then proved by the clerk, that he could not find any writ of attachment or judgment in favor of Jos. W. McClurg in his office, nor any other judgment in favor of McClurg vs. Thomas W. Freeman, except the one read in evidence.

The plaintiffs then, against the objection of defendants, offered, and read in evidence, the deposition of James W. Boren, one of the publishers of the Springfield Journal, in which the affidavit of J. W. D. L. F. Mack, one of the publishers of said paper, is contradicted in several of its essential features as to the times when, and the numbers of the paper in which, the order of publication was published.

These objections of defendants were substantially as follows:

First. Because the deposition was offered to invalidate the records of the court in the case of McClurg vs. Freeman, and was therefore inadmissisible.

Second. Because offered to disprove a fact which the records of the court in that case had recited as proven.

Third. Because parol evidence will not be allowed to contradict the facts of publication, when a recital of that fact by record entry, duly appears.

These objections being overruled, defendants excepted.

The foregoing was all the evidence. A number of declarations of law were then asked by plaintiffs, of which those given and objected to by defendants, were to this effect:

That the deed offered in evidence by defendants from the sheriff, Caldwell, reciting a judgment in favor of Joseph W. McClurg against Thomas W. Freeman, and the records and proceedings in that case showing that that judgment was rendered on publication, unless such publication was made for four weeks successively, the last insertion at least four weeks before the commencement of the term at which the defendant was required to appear, the judgment and sale thereunder were of no validity.

That a publication fails to give the notice which the law requires in such cases, if it, in regard to the nature of plaintiff's demand, only states that the action is founded on "an account for the sum of $150."

That the levy of a writ of attachment in this State upon the property of a defendant, without due notice, actual or constructive, will not authorize a judgment under which such property can be sold.

That the affidavit of the printer or publisher of a newspaper, though *prima facie* evidence of the fact of publication, yet it may be contradicted by other evidence.

That the affidavit filed in the case of McClurg vs. Freeman is bad, and could not have been published in a weekly newspaper, published regularly as required by law.

On these declarations being given, defendants excepted, and asked of the court to declare the law substantially as follows:

First. That the writ of attachment in the case of McClurg vs. Freeman, having issued after the due filing of the petition, affidavit and bond, and properly levied on the property of Freeman, gave the court jurisdiction over that property, and that the judgment was therefore valid.

Second. That the sale of that property by virtue of the execution issued on that judgment, and the deed read in evidence to Lunceford and Viles, pass the title to them, and plaintiffs are not entitled to recover.

Third. That the testimony of Boren, whose deposition was read, should not have been admitted.

Fourth. That although the interlocutory judgment may have been prematurely taken at the March term, 1864, yet that would not render the final judgment which was taken at the March term, 1865, void; and that McClurg, in that cause, was at that term entitled to final judgment.

Fifth. That the court having in the suit of McClurg vs. Freeman decided that due notice of that suit had been given when the final judgment therein was rendered, that decision of the court cannot in a collateral proceeding be attacked and shown to be erroneous by parol testimony.

All of these declarations were refused, and defendants again excepted, and judgment going for plaintiffs, after moving unsuccessfully for a new trial, defendants bring this case here by appeal.

By this record there are four questions presented for our consideration:

First. Was the order of publication sufficiently specific as to the nature and amount of the plaintiff's demand in the suit of McClurg vs. Freeman?

Second. Was that order published in conformity to law?

Third. Was it competent by parol evidence to contradict the record reciting such publication?

Fourth. In proceedings by attachment what is it which gives, and at what period during the progress of the cause does the court acquire, jurisdiction?

These questions will be answered in their order.

As to the first: In Sloan vs. Forse, 11 Mo., 126, it was held under the law of 1845, that an order notifying "that an action of assumpsit for the sum of $403.70 has been commenced against him," was a sufficient compliance with the statute, although the defendant, at the same term judgment was taken against him on that notice, and prior to the assessment of damages, moved to set that default aside. And if the order in that case was sufficient, most certainly it should be so regarded in this, where the point arises collaterally.

As to the second question: Was the order published in conformity to law?

This question is answered in the affirmative by the records of the court, expressly reciting that fact. And even in the absence of such recital, the presumption, which is the invariable incident of, and always attaches to the acts and doings of courts of general jurisdiction, could afford to our interrogatory no other than an equally satisfactory and conclusive answer.

Here there has been a solemn adjudication as to the matter of publication, unappealed from and unreserved, and that too, by a court competent to adjudicate and pass upon the validity of the service of its process, whether actual or constructive.

To deny to Circuit Courts the legitimate exercise of such a power, would be to deprive them of every thing but the bare name and semblance of authority, and defeat the very end and purpose for which the records, that of importing "absolute verity," are required by law to be kept. (Borden vs. State, 6 Eng., 519; Granger vs. Clarke, 22 Me., 128; Cook vs. Darling, 18 Pick., 393; 1 Smith's L. Cas., 1022; Voorhies vs. Bank of U. S., 10 Pet., 449; Grignon, Lessee vs. Astor, 2 How., 319.)

Of course these remarks as to the conclusiveness of record recitals are only intended to apply to cases, where those recitals are attempted to be collaterally assailed.

But aside from the prevalence of the rule above referred to, it would be by no means difficult to maintain, that the notice in the case of McClurg vs. Freeman was published according to law. The writ of attachment and order of publication were made returnable to the term commencing the 5th Monday after the 2nd Monday in March, 1864, which would be April 17th. But the Legislature by act approved January 26th, 1864, (Sess. Acts 1863 and '64, p. 287.) changed the time of holding the Polk Circuit Court to the 4th Mondays of March and September.

Section two of that act provides, that "all writs, process and proceedings made returnable to the courts of either of the

above named counties shall be returnable to the courts held under this act."

This act took effect on its passage, and the respondents now contend, that as the order of publication was not issued and published until February 9th 1864, fourteen days after the law took effect, that the publication was in violation of the law, as the order required defendant to appear on the 5th Monday after 2nd Monday in March, *i. e.* the 17th day of April, while the second section of the act referred to "required all writs, process and proceedings made returnable to the courts as then existing, should be *made* returnable to the term fixed by said act."

But there is no such provision; and that is not the language of the act, which in express terms refers to writs, process and proceedings "made returnable" to the terms of the courts as originally established, and provides that such writs, process, etc., should "be returnable to the courts under this act."

The times of holding all the terms of the courts of the seventh circuit were changed by this act, and it is very evident that the Legislature intended, by operation of law, to lengthen, if necessary, the time in which writs, process, etc., might have to be returned in some cases, and to shorten it in others. And this it was perfectly competent for that body to do. (See Carson vs. Walker, 16 Mo., 68.)

This act, as we have seen, passed January 26, 1864, barely two months and two days prior to the time when by its terms the Polk Circuit Court was to be held, and took effect immediately on its passage; and the respectful consideration, which is due to a co-ordinate branch of the government, compels the belief, that it never was the intention of the framers of that law to perpetrate such an absurdity as to require the clerks of all the various courts therein enumerated to recall all writs, process and proceedings, made returnable to the courts as then existing, and make them returnable to the terms provided for in the new law. And yet such is the only legitimate deduction from what clearly is the theory of respondents, that the law did not by its own force accomplish a change in the writs, process, etc., already "made returnable."

Our third question has been impliedly answered in our replies to the second. But further under that head. The affidavit of the printer was a mere matter of preliminary proof, and accomplished its functions so soon as it was filed and passed upon by the court. And yet plaintiffs were permitted, years after the judgment was rendered, in a collateral action to re-open the case and introduce evidence to falsify the record.

With equal propriety the court could in the same collateral way have permitted the judgment itself to be re-opened, and a review had of the evidence on which it was rendered. (Chambers vs. Carthel, 35 Mo., 374.)

Any other rule, than that the records of courts of competent jurisdiction shall in all collateral proceedings be conclusive and impregnable to attack, would be subversive of all the safe-guards which the law in its wisdom has from the earliest period of its history thrown around the sanctity of records. Thus in 10 Vin. Abr. Tit. Record C., pl. 2, from Br. E. pl. 78, this case is reported:

"Record of outlawry of divers persons was certified in the exchequer, among whom one was certified out-lawed, and was not out-lawed, and that his goods forfeited were in the hands of 'I. N.,' and upon process made against him, he came and said he was not outlawed; and parcel of the record came by chancery out of "B. R." into the exchequer; and Green, justice of "B. R.," came into the exchequer, and said he was not out-lawed, but that it was misprision of the clerk. Skipwith said: Though all the justice would record the contrary, they shall not be credited when we have recorded that he is out lawed."

And that case is cited with approval in McPherson vs. Cunliff, 11 Serg. and Rawle, 438, where an attack had been made on a sale of land ordered by a probate court on the ground of total mistake as to the real parties in interest, the court having ordered the sale to be made under the supposition that a family of children, who were bastards, were really the heirs of the deceased.

In Granger vs. Clarke, *supra*, it is said: "If in looking at

the subject matter of the judgment it can be clearly seen to be not within the jurisdiction of the court rendering it, it may be treated as a nullity without reversal."

But where a want of jurisdiction actually exists in a domestic tribunal of general jurisdiction, and is not apparent upon the record, there must be some appropriate mode of ascertaining it. This mode is by writ of error. And until such appropriate mode is resorted to, and has proved effectual, the judgment must be considered as conclusive and as importing absolute verity.

This was a case where *nul tiel record* was plead by defendant; that no notice or process was ever served on him; and that the judgment (on which suit was brought) had been obtained and entered by fraud.

In McCarthy vs. Marsh, 1 Seld., 263, where the plaintiff had sued in ejectment, and it became material to ascertain whether or no McCarthy was an alien; and he introduced the record of his naturalization on the 26th of August, 1834, and the recitals of that record were attempted to be overthrown by parol testimony, and by an entry of record of the same court, dated September 2nd, 1831, showing that Daniel McCarthy, instead of declaring his intention to become a citizen, had merely reported his arrival in the country; but inasmuch as the recital in the minutes of August 1834, did not refer to the proceedings of September 1831, as being the declaration on which the court admitted McCarthy to citizenship, the record was held conclusive; and that the record of 1834 compelled the presumption, that evidence other than that contained in the minutes of 1831, had been produced.

But why multiply authorities as to the conclusiveness, as between the parties, of record recitals. The horn-books of the profession abound with illustrations of this familiar rule.

As to the fourth and last question:

In proceedings by attachment what is it which gives, and at what period during the progress of the cause does the court acquire, jurisdiction?

And this I regard as the question of paramount importance

in this case; all the others I have endeavored to consider, being but minor and secondary, and in no way aiding or retarding the arrival herein at a correct conclusion.

In Hardin vs. Lee, 51 Mo., 241, it was said *inter alia*, that "In attachment causes the jurisdiction over any given subject matter is obtained by the levy thereon of a writ properly issued. And no matter what, nor how great errors or irregularities may subsequently occur, the *res* remains still in the grasp of the court, and its judgment in regard thereto will be valid and binding, until reversed on error or by appeal, or set aside in a direct and appropriate proceeding for that purpose."

And no subsequent examination has induced the slightest change in the opinion there enunciated.

The position here taken is no new departure from old and well established rules, no legal heresy promulgated for the first time, contravening the orthodox canons of the law; but one amply supported by a long line of carefully reasoned cases, adjudicated by many of the ablest tribunals, both State and National, in this country.

Under the law in Ohio, the plaintiff was required to have the notice to the defendant published, and if he failed for six weeks successively to publish such notice, the statute directed that the attachment should be dismissed with costs. (A statute it will observed, much more strict in this respect than ours.)

And yet, in Paine vs. Moorland, 15 Ohio, 435, where no such notice was in fact given, but judgment rendered and the property attached sold, the court held the proceedings valid; among other things remarking:

"A court acquires jurisdiction by its own process. If the process of the court be executed upon the person or thing concerning which the court is to pronounce judgment, jurisdiction is acquired. The writ draws the person or thing within the power of the court; the court once having by its process acquired the power to adjudicate upon a person or thing, it has what is called jurisdiction. This power or jurisdiction is

only acquired by its process. To give jurisdiction is the object of process. The mode of executing or serving process is sometimes directed or permitted to be by notice of publication. All process issues under the seal of the court. Notice by publication is not process, but in certain cases in contemplation of law is equivalent to service of process. The process in attachment is the writ authorizing a seizure of the property. No process is issued against the person, because the proceeding is *in rem*. The statute, however, regards it but just that notice should be given to the debtor, not for the purpose of giving the court jurisdiction over the subject matter, but to permit the debtor to have an opportunity to protect his rights, and directs that the writ shall be quashed if it be not given. The distinction is between a lack of power or want of jurisdiction in the court, and a wrongful or defective execution of the power. In the first instance, all acts of a court not having jurisdiction or power are void, in the latter voidable only. A court then may act, first, without power or jurisdiction, second, having power or jurisdiction may exercise it wrongfully; or third, irregularly. In the first instance, the act or judgment of the court is wholly void, and is as though it had not been done.

"The second is wrong and must be reversed upon error. The third is irregular and must be corrected by motion. The latter is where the power is rightfully exercised, but in an irregular way. Hence there is a vast distinction between a defect of power, a wrongful exercise of power, and an irregular exercise of power."

In Cooper vs. Reynolds, 10 Wallace, 308, in regard to the point we are now considering, Judge Miller in delivering the opinion of the court says:

"If the defendant appears, the cause becomes mainly a suit in personam with the added incident that the property attached remains liable, under the control of the court, to answer any demand which may be established against the defendant by the final judgment of the court. But if there is no appearance of the defendant, and no service of process on him, the case

becomes, in its essential nature, a proceeding *in rem*, the only effect of which is to subject the property attached to the payment of the demand which the court may find due to the plaintiff. * * * Now, in this class of cases, on what does the jurisdiction of the court depend? It seems to us that the seizure of the property, or that which in this case is to the same effect, the levy of the writ of attachment on it, is the one essential requisite to jurisdiction, as it unquestionably is in proceedings purely *in rem*. Without this the court can proceed no further; with it the court can proceed to subject that property to the demand of plaintiff." To the same effect, see Voorhees vs. Bank of U. S., 10 Pet., 449; Williams vs. Stewart, 3 Wis., 773; Beach vs. Abbott, 6 Verm., 586; Porter vs. Partee, 7 Humph., 168; Cochran's heirs vs. Loring, 17 Ohio, 409; Drake, Att. § 437; Hollingsworth vs. Barbour, 4 Pet., 475.

It will be thus seen from the above cited authorities, that in attachment causes, where property has been seized or levied on under a writ properly issued, notice is not an essential of jurisdiction. As Chief Justice Marshall said in the case of "The Mary:" "Where the proceedings are against the person, notice is served personally or by publication; where they are *in rem*, notice is served upon the thing itself."

The difference to be observed between those proceedings, whose seizure of property at the outset at once confers jurisdiction over that which is seized, and those methods of proceedure which look to the acquisition or enforcement of some specific right, title or remedy, is this: That in the former class of cases, jurisdiction without seizure or levy never attaches, no matter how long or how often notice may be given; nor in the latter until publication be made. In other words, it is the levy of the writ in one case, and the publication in the other, that gives the court power to act; and this is jurisdiction.

In a general way, a court may be said to have jurisdiction over every case which may hereafter be instituted therein. Thus courts are said to have jurisdiction to divorce parties, to foreclose mortgages, to enforce vendor's liens, etc., although a suit of that nature may never be brought therein.

But the term as here employed is with the more limited signification of the power to deal with some specific property, subject matter, right or claim, and concerning which some adjudication or relief is sought.

But we are cited by respondents to a number of authorities, both in this State and elsewhere, as supporting their position, that any and every judgment where the defendant has not been notified is void; and the necessary inference, evidently intended to be drawn therefrom, is that the judgment of McClurg vs. Freeman was also a nullity. A brief examination will therefore be now made of these cases. The case of Durossett's adm'r, vs. Hale, 38 Mo., 346, does not involve the point under discussion. That was a direct proceeding by motion to set aside a judgment for irregularity on the ground that defendant had not been properly notified. And the record did not show that any affidavit had been filed. And so the loose remarks of Judge Holmes, that the judgment was void because the notice did not inform the defendant "that his property had heen attached," must be construed with reference to the circumstances of that particular case.

In Massey vs. Scott, 49 Mo., 278, the only matter passed upon by the court below, (and as a matter of course the only one upon which this court could adjudicate), was, whether the title of land which had been attached would be conveyed by a sale under a special *fi fa.*, but where only a general judgment had been rendered in the cause.

And the remarks there, as to what gave and what completed jurisdiction in suits by attachment, were entirely *dehors* the record. But even there *arguendo* it is stated, "that the court obtained jurisdiction by the levy of the attachment." Though singularly enough in the next sentence, the learned judge, who delivered the opinion of the court, says: "And after the order of publication had been duly published, the jurisdiction was complete to render a judgment binding the attached property."

Now conceding, that these *dicta* of the learned judge were part and parcel of the opinion of the court, it would still be extremely difficult to comprehend, how a court could obtain

jurisdiction by the levy of its writ, and that jurisdiction at the same time be not "complete" until the subsequent occurrence of publication.

The case of Smith vs. Ross, 7 Mo., 463, was simply a proceeding *in personam* on a judgment recovered in Alabama, which purported to have been rendered on personal service.

Caldwell vs. Lockridge, 9 Mo., 362, merely decides this: That after an administrator has made a final settlement, in which an allowance had been made to him, the court could not, without notice to him, and after his departure, even during the same term, set aside that allowance. But that case, as well as that of Smith vs. Ross, *supra*, does not militate in the least against the position I have assumed; and the same may be said of Anderson vs. Brown, 9 Mo., 646; Howard vs. Thornton, 50 Mo. 291; McNair vs. Biddle, 8 Mo., 257; Fithian vs. Monks, 43 Mo. 502.

The case of Thatcher vs. Powell, 6 Wheat. 119, relates to a tax-sale, a proceeding so summary, that the law respecting these sales has always been strictly construed.

Bloom vs. Burdick, 1 Hill, 140, asserts the doctrine, that in a proceeding to sell a decedent's estate the proper notice must he given before the court would acquire any jurisdiction; and as heretofore seen, I fully concur in that doctrine.

The case of Sherwood vs. Reade, 7 Hill, 433, is only in relation to duties of commissioners respecting sales of real estate.

So then it will be observed, that none of the authorities cited by respondents have any applicability to the point in hand, nor are they in the slightest degree in antagonism with the principles for which I have contended. And I very much doubt, whether a single well considered case can be found in opposition thereto.

No attention will be given to the point raised here by respondents, that the sheriff's deed to Lunceford and Viles was void for uncertainty, as neither the attention of the court, nor of the defendants, seems to have been called to that matter when the cause was tried.

In conclusion, the court erred on all the questions presented by this record, and for this reason the judgment will be reversed and the cause remanded.

Judge Adams not sitting; the other judges concur.

JAMES F. MCADOW, Respondent, *vs.* D. M. ROSS, *et al.*, Appellants.

1. *Practice, civil—Pleadings—Counter-claims.*—A. sued B. and C. on mechanic's lien for material furnished for B's house under a contract with C., the contractor for building. B. in his answer, denied all knowledge of A's furnishing any materials, and denied that A. gave him any notice of his lien; then as a counter-claim B. alleged, that A. guaranteed that C. should build the said house in a workmanlike manner, and complete it by a certain date, and asserted that neither condition was fulfilled, and claimed damages for their breach. *Held*, that this defense was admissible in this suit as a counter-claim, and was not inconsistent with the prior defenses.

Law of counter-claim and set-off reviewed *in extenso*.

Appeal from the Jackson Circuit Court.

Wm. Douglas, for Appellants.

I. The counter-claim here pleaded, arose "out of the contract or transaction set forth in the petition as the foundation of the plaintiff's claim," and was "connected with the subject of the action." (W. S., 1016, § 13.)

A. A. Tomlinson, for Respondent.

The two defenses are inconsistent. The first is a denial of every allegation in the petition necessary to constitute a cause of action. The second is a confession and avoidance. (Adams vs. Trigg, 37 Mo., 141; Fugate vs. Pierce, 49 Mo., 441.)

The counter-claim was properly stricken out. 1st. There was no mutuality of indebtedness between plaintiff and defendant Smallwood.

2d. The damages were unliquidated, and could not be pleaded as set-off. (W. S., 1273; Johnson vs. Jones, 16 Mo., 494; Mahan vs. Ross, 18 Mo., 121; Pratt vs. Menkins, *Ibid.* 158; Brake vs. Corning, 19 Mo., 125.)

VORIES, Judge, delivered the opinion of the court.

This action was brought to enforce a mechanic's lien.

The petition charges, that the defendant Ross is indebted to plaintiff in the sum of $79.32, for materials furnished by plaintiff to said Ross, the particulars of which are filed: that said materials were furnished for a house erected under a contract with said Ross, (describing the house and lot on which it is situate); that said Ross was the contractor of defendant Smallwood for the erection of said house, for which the materials were furnished, and that said Smallwood was the owner and proprietor of said house and lot; that the indebtedness accrued on the 18th day of November, 1867; that on the 4th day of January, 1868, plaintiff gave notice to said Smallwood, that he held this claim against said property, setting forth the amount and from whom due; that on the 17th day of March, 1868, plaintiff filed with the clerk of the Circuit Court of Jackson County, a just and true account of the demands claimed after all just credits had been given, and a true description of the property on which the lien was intended to apply, with the names of the contractor and owner of the property, which was verified by the oath of plaintiff; a certified copy of all which was filed with the petition.

Judgment is then prayed against said defendant, Ross, for the amount of the account and interest, and that plaintiff's lien be enforced against the property named, &c.

The defendant Smallwood appeared and filed his demurrer to the petition, which being overruled, he by leave of the court filed an answer.

In his answer he says, that he has no knowledge, or information sufficient to form a belief, as to whether the plaintiff furnished the timber sued for or not. He denies, that plaintiff ever, at any time, gave him notice of his claim against Ross, as stated in the petition, and denies that plaintiff's claim was filed in the clerk's office as directed by the statute.

The defendant then, for a further answer and counter-claim, states, "that on the 29th day of Oct. 1867, he and said D. M. Ross entered into a contract in writing, which is herewith

filed, whereby the said Ross promised and agreed to build for this defendant a house of the dimensions in said contract specified, and which was to be finished by the 25th day of Nov. 1867, in a good and workmanlike manner, and that plaintiff guaranteed in writing, that said Ross should perform and complete said contract according to its said terms, and which is the same house mentioned in the petition, and which guaranty is herewith filed; that this defendant accepted said guaranty, and plaintiff had due notice of said acceptance; that said Ross did not keep nor perform his said contract, but made breach thereof, in that said house was not completed on said 25th day of November, 1867, nor until one month afterwards, whereby defendant was damaged in the sum of fifty dollars, and that the plastering of said house was not put on in a good and workmanlike manner, nor was it done at the time it ought to have been done, but on the contrary, said plastering was put on in so unskillful and unworkmanlike manner, and at a time when it froze, so that all of it fell off, and defendant was compelled to and did employ other persons to put on new plastering, at a great cost, to-wit: at the cost and expense of one hundred and fifty dollars, by reason whereof, defendant says he is injured, and has sustained damage to the amount of two hundred dollars, for which he asks judgment."

The second defense or counter-claim set up by the answer and above copied, was on the motion of the plaintiff stricken out. The grounds of the motion to strike out this counter-claim were, 1st. That it constituted no legal defense to the action, and was inconsistent with the previous defense set up in the previous part of the answer. 2nd. The liability of the guarantor is contingent, and cannot be pleaded as a set-off. 3rd. There is no mutuality of indebtedness between plaintiff and defendant Smallwood.

The court sustained this motion, and struck out from the record said part of said answer, and the defendant excepted.

A trial was afterwards had and judgment rendered against the defendant Ross, for the debt named in the petition, and subjecting defendant Smallwood's house, named in the petition, to sale for the payment of the judgment.

The defendant, Smallwood, then filed his motion for a new trial for the following reasons: 1st. The court erred in striking out part of defendant's answer, and because the court erred in refusing to declare the law to be as asked for by the defendant.

This motion being overruled, the said defendant excepted, and has appealed to this court.

The only matter complained of by the appellant in this court is, that the court below erred in striking out the counter-claim pleaded by defendant Smallwood, which constituted the second ground of defense on the part of said defendant. It is insisted by the respondent, that this second defense or counter-claim, set up by the defendant, is inconsistent with the first part of the answer, and therefore properly stricken out. "The defendant may set forth by answer as many defenses and counter-claims as he may have, whether they be such as have been heretofore denominated legal or equitable or both." (Wag. Stat., 1010.) It is further provided, that "different consistent defenses may be separately stated in the same answer." The question now is, is this counter-claim set up by the defendant inconsistent with the former averments in the answer within the meaning of this statute? I think it is not. The answer first states, that the defendant has no knowledge, or information sufficient to form a belief, as to whether the material mentioned in the petition was furnished by plaintiff to the said D. M. Ross; and then the answer denied, that plaintiff at any time gave notice to defendant, that he held said claim against said property. Can these allegations, and the allegations made in that part of the answer stricken out, both be true? If they can, they are not inconsistent within the meaning of the statute; that they may both be true, does not admit of an argument; there is nothing inconsistent in the fact, that plaintiff did not give the defendant notice of his claim, or that he never furnished the lumber charged for, and the fact that plaintiff guaranteed, that the work to be done in building the house should be well done and done in the time specified; both of these facts may be lit-

erally true. This question has been fully discussed and decided in the case of Nelson vs. Brodhack, 44 Mo., 596. The learned judge, delivering the opinion in that case, says, that the technical rule, which supposed that such special defenses confessed and avoided, when in fact they did not confess at all, should not be adopted in such cases. This case is not like the facts of the case in Fugate vs. Pierce, 49 Mo., 441. In that case the two positions maintained by the defendant were perfectly irreconcilable, and could not both stand together, and were clearly within the prohibition of the law. It is next insisted by the respondent, that the matter set up in this answer as a counter-claim fails to show any mutuality of indebtedness between the plaintiff and the said defendant, and that it was therefore properly stricken out. The respondent seems to make no distinction between what is denominated a set-off under our statute, and a counter-claim. It is provided by the first section of Ch. 125, Wag. Stat., 1273, that, "If any two or more persons are mutually indebted in any manner whatever, and one of them commence an action against the other, one debt may be set-off against the other, although such debts are of a different nature." Now it is admitted, that this statute only permits a set-off to be pleaded where there are mutual debts, and under its provisions unliquidated damages could not be set off against one, who brought suit to recover on a demand against the other; but the statute, authorizing counter-claims to be set up by a defendant, is very different. The statute in such case is specific, and it seems that but little room is left to misunderstand its provisions or meaning. By the 12th and 13th sections of Ch. 5 of the statutes of this State (Wag. Stat., 1015, 1016,) it is provided as follows: "The answer of the defendant shall contain: First, a special denial of each material allegation of the petition controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief; second, a statement of any new matter constituting a defense or counter-claim, in ordinary and concise language without repetition."

Second—"The counter-claim mentioned in the last section

must be one existing in favor of the defendant and against a plaintiff, between whom a several judgment might be had in the action, and arising out of the following causes of action: First, a cause of action arising out of the contract or transaction set forth in the petition as the foundation of the plaintiff's claim, or connected with the subject of the action; Second, in an action arising on contract, any other cause of action arising also on contract, and existing at the commencement of the action." By these two sections it will be seen, that it is not required that a counter-claim should be a liquidated demand, nor is it required that there should be any mutual indebtedness existing between the parties, but if the cause of action shall arise out of the contract, or transaction set forth in the petition as the foundation of the plaintiff's claim, or is connected with the subject of the action, it will be a good counter-claim, whether the damages claimed are liquidated or not. The first question to be considered is, could a several judgment be rendered upon this counter-claim against the plaintiff in this case, and in favor of the defendant. It requires no argument to show, that the defendant could have a several judgment against the plaintiff on this guaranty, if his case were made out by evidence. There is the breach of this guaranty, set up by the defendant as a counter-claim connected with the subject of the action. The subject of the action, so far as it concerns the plaintiff and the defendant Ross, is the material furnished to Ross, to recover for which the suit is brought; but as between plaintiff and defendant Smallwood, the subject of the action is the lien attempted to be enforced against Smallwood's house, growing out of the fact that the plaintiff has furnished material, which has been used in the building of the house, and the very house that the plaintiff has guaranteed shall be well built and constructed by a time named in the contract guaranteed by the plaintiff. Now the plaintiff has bound himself by his contract of guaranty, that this house shall be completed by the 25th of November, in a good and workmanlike manner and has furnished part of the material to be used

in the erection of the house; has sued for this material; is asking for a judgment authorizing the sale of the house, which he agreed should be completed, but is not; and shall it be said that this defendant must have his house sold to pay for the lumber that has gone into its construction, and afterwards bring an action against the plaintiff to recover damages for the failure to complete the very house sold by plaintiff? It seems to me, that this is one of the cases intended to be covered by the language of the law, that is, this counter-claim is "connected with the subject of the action." As before stated, the subject of the action, as it affects Smallwood, is the material furnished by plaintiff, and used in the erection of the house belonging to Smallwood, which creates the lien on the house, in the erection of which the material was used. The counter-claim grows out of the failure to properly erect and finish the very house, in which the material was used, for which the lien is attempted to be enforced. Hence, while the counter-claim does not arise out of the contract, or transaction, set forth in the petition as the ground of action as against defendant Ross, it is connected with the subject of the action, so far as it is attempted to sell the house by virtue of the mechanic's lien. (Jones vs. Moore, 42 Mo., 413.) In the case here referred to, Judge Holmes, in delivering the opinion of the Court, refers to Tiffany & Smith, New York Practice, for a definition of what constitutes a counter-claim, under a statute in the exact language of our statute on the same subject. It is there stated, that a counter-claim "may be set up, where it is a cause of action arising out of the contract, or transaction, set forth in the complaint as the foundation of the plaintiff's claim, or is connected with the subject of the action, or in case the cause of action in the complaint arises on contract, then any other cause of action, also arising on contract, and existing at the commencement of the action in favor of the defendant and against the plaintiff, may become the subject of a counter-claim." This to my mind is the only proper construction of the statute. The first clause, in the section referred to, embraces cases where the

counter-claim arises out of the contract or transaction set forth in the petition, or where the counter-claim is connected with the subject of the action; in such cases it makes no difference, whether the damages claimed by the counter-claim are liquidated damages or not. If the claim be for a debt or damages growing out of the subject of the action, or arise out of the transaction set forth in the petition as a ground of action, it is enough. The second clause of the statute provides for cases where the plaintiff's action arises exclusively upon a contract, in which case a cause of action arising also on contract in favor of the defendant and against the plaintiff, which existed at the commencement of the action, may be set up as a counter-claim in the action. It is true, that the learned judge, in his opinion in the case of Jones vs. Moore, above referred to, seems in his argument to hold, that the cause of action must not only arise out of contract to be set up as a counter-claim in an action founded upon contract, but that it must also grow out of the same transaction; but it was not necessary to consider that point in the case then under consideration, and the learned judge evidently inadvertently confounded the two clauses in the section of the statute referred to. The statute is plainly the other way, and has been so construed by the courts of New York, where the construction of these clauses of the statute seems to have been well considered. (Tiff. & Sm. N. Y. Pr., 378 and cases there cited; Curtis vs. Barnes, 30 Barb. N. Y. R., 225.) In this last case the parties mutually submitted a matter to arbitration, and bonds to abide the decision of the arbitrators were mutually executed and delivered, and after the hearing had been commenced, but before the same had been completed, one of the parties revoked the submission, and brought an action against the other party to recover the claim so submitted. It was held, that in such case the defendant may recover, by way of counter-claim, the damages sustained by him by reason of the revocation of the submission. It will be seen, that the damages in the case above stated were wholly unliquidated, but were still admitted as

a counter-claim. The cases referred to by the plaintiff are all cases where the matter set up by the defendant had been set up as an off-set, or was wholly considered under the law concerning off-set, which is very different from the law authorizing a counter-claim. The law, authorizing one debt to be set off against another, requires the debts so set off to be mutual debts existing between the parties, which excludes the idea of unliquidated damages, and is altogether different from a counter-claim, each defense being governed by the particular statute relating thereto. (Spencer vs. Babcock, 22 Barb., 326; N. Y. Pr., 379, above referred to.)

In the case under consideration, if the action as against defendant Smallwood is to be considered an action founded on the contract by which the lumber and material was sold to Ross, then Smallwood can by the statute set up as a counter-claim any cause of action also growing out of a contract, which existed at the commencement of the action, in his favor and against the plaintiff. If on the other hand the cause of action, as against defendant Smallwood, grows out of the remedy given plaintiff by the statute to enforce a lien against the property, because the plaintiff has furnished material, which has been used in the erection of, and now constitutes a part of, Smallwood's house, then as the counter-claim is for a breach of the contract to build or erect the same house, it is connected with the subject of the action, and in either case may be pleaded as a counter-claim, or defense as counter-claim to the action.

The counter-claim in this case was not pleaded with as much certainty and particularity of averment as is desirable in technical pleadings, but we think it is in substance good, and ought not to have been stricken out. The judgment will therefore be reversed.

Judges Adams and Napton not sitting, the other Judges concurring, the judgment will be reversed and the cause remanded.

O. N. HOSHAW, Defendant in Error, *vs.* JOHN GULLETT, Plaintiff in Error.

1. *Attachment—Delivery bond—Possession of property.*—The obligation entered into in a forthcoming bond given by defendant in an attachment suit to deliver the property attached according to the orders of the court, is sufficient presumptive evidence, without further proof, that the property was "found in his possession," as contemplated by the statute. (W. S., 188, § 24.) Such a bond will warrant summary proceedings by motion against the obligee and his sureties.

Appeal from Lawrence Circuit Court.

Price, Hardin & Wear, for Plaintiff in Error.

I. The bond is wholly void. It was not given by the defendant or by any third person, in whose hands the property was found. (Sewall vs. Franklin, 2 Porter, 493; 4 Stewart and Porter, 397; Drake Att., § 333.)

N. Bray, for Defendant in Error.

I. It is not necessary "that the bond show on its face that the property was found in the hands of defendant."

Defendant assumes by his intervention in making the bond that he is in possession of the property; and that he has a right to thus intervene on account of the property. And if he fails to comply with the conditions of the bond, he is responsible. And he cannot be permitted again to litigate the action. (16 La. An., 125; Frost vs. White, 14 La. An., 140.)

II. He is estopped from denying that facts existed which authorized the defendant to give the bond, and bound the sheriff to accept the same. (Bartlett vs. Willis, 3 Mass., 86; Flagg vs. Tyler, 3 Mass., 303; More vs. Parker, 3 Mass., 310, and cases cited; Drake Att., 2nd. Ed., §§ 327, 328, 329, 339, and cases cited; 12 Ill., 93; Beal vs. Donman, 1 Call., 219; Crisman vs. Matthews, 1 Scam., 148; Johnston vs. Merrinether, 3 Call., 454; Inman vs. Strattan, 4 Bush., (Ky.,) 445; Heynemann vs. Eder, 17 Cal., 433; Sheppard vs. Collins, 12 Ia., 570; McMillan vs. Dana, 18 Cal., 339; see also, Onderdonk vs. Voorhies, 2 Rob., N. Y., 24; Evans vs. Matson, 51 Penn. St. 366.)

WAGNER, Judge, delivered the opinion of the court.

Plaintiff brought his suit by attachment, and the sheriff attached certain personal property belonging to one of the defendants in the suit. The appellant in this case with others gave a bond for the forthcoming and delivery of the property and obtained possession of the same. The attachment suit was duly prosecuted to judgment, and an execution was issued and returned, "no property found." The sheriff assigned the bond to the plaintiff by order of court; and notice was served on the appellant stating that a motion would be filed in court to have judgment entered on the bond. Upon hearing the motion, the court ordered the appellant to deliver the property to the sheriff within a prescribed time, and he failing to do so, judgment was rendered against him on the bond.

He afterwards moved to set aside the judgment, the court overruled the motion and he appealed.

The main reason assigned for reversal is, that the bond was not a statutory bond so as to authorize this summary proceeding. The bond states that the obligors are held and bound unto the sheriff and his successors and assigns, conditioned that they shall deliver to the said sheriff, his successors or assigns, the personal property attached at such time and place as the court shall direct.

The statute provides, that "when property of the defendant found in his possession or in the hands of any other person, shall be attached, the defendant or such other person may retain the possession thereof, by giving bond and security to the sheriff, his successor or their assigns, in double the value of the property attached, conditioned that the same shall be forthcoming when and where the court shall direct, and shall abide the judgment of the court." (1 W. S., 186, § 24.) A subsequent provision, (§ 54,) declares that where none, or only part of the property has been found, the court shall direct the officer to assign the bond to the plaintiff, and the court may on motion render judgment, in favor of the plaintiff and against the obligors in the bond.

It is now insisted that as the record does not show that the

attached property was found in the possession of the defendant, or in the hands of any other person, there is not such a compliance with the statute as would warrant a judgment by summary proceedings.

It is true, it is not directly stated, that the property was found in the hands of the obligor, the appellant here. But I think that fact is acknowledged, and sufficiently apparent, by his voluntarily entering into the obligation, and undertaking that the property shall be brought forth and delivered up in accordance with the direction of the court. The bond observes all the essential requirements of the statute, and is substantially good. To hold otherwise, would we think, be sacrificing undoubted justice to a mere technicality.

It is not pretended that the appellant had any meritorious defense. He was in court but offered no testimony, and assigned no reason why he was not liable. We have not been able to find any other question in the case demanding any consideration.

With the concurrence of the other Judges, the judgment will be affirmed. Judge Sherwood did not sit.

A. M. Appleby, Defendant in Error, *vs.* John McElhannon, *et al.*, Plaintiffs in Error.

1. *Practice, Supreme Court—Statement and brief.*—Where plaintiff in error fails to file a statement and brief, the writ will be dismissed.

Error to Green Circuit Court.

W. C. Price & Wright, for Plaintiffs in Error.

McAfee & Phelps, for Defendant in Error.

Wagner, Judge, delivered the opinion of the court.

This case is brought here by writ of error. The plaintiff in error has entirely failed to file a statement and brief as the statute requires. The writ will therefore be dismissed. The other Judges concur.

JAMES HERALSON, Appellant, *vs.* JEPHTHA MASON, *et al.*, Respondent.

1. *Principal and sureties—Prior suit against principal, when unnecessary.*—The condition of a bond was, that a holder should not prosecute the sureties till he had exhausted all legal remedies against the principal. *Held*, that where the principal was totally insolvent and nothing could be realized out of him on execution, it was unnecessary to bring suit against the principal before proceeding against the sureties.

Appeal from Greene Circuit Court.

Crawford & Cravens, for Appellant.

I. The condition to be performed was not a condition precedent. (4 Kent, 125 and note (1); Boone vs. Eyre, 1 H. Black, 254; 1 Ch. Pl., 323; 10 East, 295, 556, 563; McCullough vs. Cox, 6 Barb., 387; 2 Pars. Cont., (5th Ed.), 527. See also, 6 Mo., 392; 7 Mo., 462; 36 *Id.*, 439; 7 Johns., 249.)

II. If, by the terms of contract, it has been necessary in any court to sue the principal first, the allegation of insolvency in the petition, was a good excuse for the failure to sue. (See 3 Johns., 598.)

E. Y. Mitchell, for Respondent.

The appellant cannot recover in this action, until he shall have "exhausted all legal means to collect the debt from the principal debtor." Nor can the court say suit was unnecessary, because the party was insolvent at the time of giving the note, and remained continuously so to the bringing of the suit. It is sufficient that the parties who signed the note, deemed it of sufficient importance to insert the condition in their contract. The court will construe the contract according to the intention of the parties. (9 Wheat., 702; 10 Mo., 566; 44 Mo., 254; 20 Ohio, 93.)

Respondent may rely on the non-performance of the condition as a defense to the note. (2 Pars. Cont., (5th Ed.,) 527, 676, 677.)

The agreement in this case goes to whole consideration of the contract, and the promise to pay is dependent on the condition precedent, that the holder of the bond will exhaust all

legal means to collect the note from the principal debtor. (2 Pars. Cont., (5th Ed.,) 676, 677, 527.)

The liability of a surety is not to be extended by implication beyond the terms of his contract. It is not sufficient that he may sustain no injury by a change in the contract, or that it may even be for his benefit. He has the right to stand on the very terms of his contract. (Miller vs. Stewart, 9 Wheat., 702; Blair vs. Perpetual Ins. Co.,10 Mo., 559; State vs. Boon, 44 Mo., 254; McGoveny vs. State, 20 Ohio, 93; and cases there cited; Bethune vs. Dozier, 10 Ga., 235; Dalrymple vs. Lanman, 23 Md., 399; Thompson vs. Oliver, 18 Iowa, 418; Stokes vs. Burell, 3 Grant, (Penn.,) 241; Legett vs. Humphreys, 21 How. U. S. R., 66; 2 Sto. Cont. (4th Ed.,) §§ 870, 871; U. S. vs. Boyd, 15 Pet., 187, and cases there cited.)

WAGNER, Judge, delivered the opinion of the court.

This was a suit instituted against the sureties upon a bond or written obligation for the payment to the plaintiff of the sum of six hundred dollars. The bond was executed upon the condition that the holder or obligee should not prosecute any suit or action at law against the sureties, until he had exhausted all legal means to collect the same from the principal, or his legal representatives. No suit or action at law was commenced or prosecuted against the principal prior to the institution of this proceeding, but as an excuse or reason why such action had not been commenced, it was averred in the petition that the principal was wholly insolvent and worthless, and that an action against him would have been totally unavailing. But on the trial, the court excluded all the evidence offered to establish the insolvency of the principal, and then at the instance of the defendant, declared the law to be, that before the plaintiff could recover against the defendant, it was necessary that he should have instituted suit against the principal before a court of competent jurisdiction, and by judgment and process make the fact appear, that the debt contracted in the bond could not be realized out

of the property of the principal; and that the only competent evidence to show the principal's insolvency, was a judgment and process had and obtained against him in a court of competent jurisdiction. The plaintiff's instructions asserting the converse of the above propositions, were refused. The court sitting as a jury, then rendered judgment for defendant, and plaintiff appealed.

The only question in the case presented by the record is, whether it was necessary to prosecute a suit to final judgment against the principal in the bond, notwithstanding he was entirely insolvent and nothing could have been realized thereon by process or execution.

This precise question has been recently before this court and definitely determined. The case was a suit brought to enforce the liability of a stockholder in a corporation, and the statute declares, that no stockholder shall be personally liable for the payment of any debt contracted by any company formed under its provisions, which is not to be paid within one year from the time the debt is contracted, nor unless a suit for the collection of such debt shall be brought against such company within one year after the debt shall become due. The year had expired and no suit had ever been brought against the company, and the defendants who were stockholders, pleaded this as a defense. But it was decided that as the company was insolvent, no action was necessary against it, prior to the plaintiff's commencing his suit against the stockholders. A suit would have produced nothing—it would have been a vain, idle and unnecessary act, and such the law never requires. (State Sav. Ass'n vs. Kellogg, 52 Mo., 583.) So in this case, if the principal was entirely insolvent and possessed no means by which anything could be coerced out of him, on execution, what useful purpose would have been subserved by taking the trouble and going to the useless expense of obtaining a judgment which would not have been worth the paper on which it was written. When a thing becomes useless, nugatory or ineffective, the law dispenses with it. The condition of the bond made it incumbent on

the plaintiff to pursue and exhaust his legal remedy against the principal, before resorting to the sureties. But if the principal was so palpably insolvent, that nothing whatever could have been made out of him by legal proceedings, all efforts in that direction would have been vain and idle.

The condition was inserted for the benefit and protection of the sureties, but when it is clearly shown that the principal is entirely insolvent, they may be proceeded against without the unnecessary and ineffective formality of prosecuting to judgment an action against the principal; and their liability or situation is not changed thereby. The court erred in excluding evidence, and in giving and refusing instructions, and its judgment must be reversed, and the cause remanded.

Judges Vories and Sherwood concur; Judges Napton and Adams not sitting.

ST. LOUIS AND IRON MOUNTAIN RAILROAD, Petitioner, *vs.* GEO. B. CLARK, STATE AUDITOR, Respondent.

1. *Railroads—Iron Mt. R. R.—Sale of—Unpaid balance of purchase money—Construction of statute—State interest fund.*—The Cairo & Fulton R. R. and the St. Louis & Iron Mt. R. R., were sold by the State for $900,000. At the sale $225,700 was paid, leaving a balance of $674,300 to be paid on time. By § 8 of the act of March 17th, 1868, (Sess. Acts 1868, p. 95,) it was provided that the unpaid balance of $664,300, "together with all interest that might accrue thereon," should be appropriated to building a branch road from Pilot Knob to the Arkansas State line. *Held*, that under this act, the road last named was entitled to an appropriation of $664,300, and not $674,300. And held further, that notwithstanding that act, under the act touching State interest, etc., (W. S., 1280,) the road last named would have no claim to the interest on said unpaid balance which had been collected and applied by the State Treasurer to the State interest and sinking fund. Mandamus against the State to enforce the payment of the $10,000 or the amount of the interest paid over, would not lie.

(The road from Pilot Knob to the Arkansas State line was an extension of the St. Louis & I. M. R. R.)

Petition for Mandamus.

Dryden & Dryden, for Petitioner.

I. The designation of the sum of $664,300 in § 8, was merely descriptive of the fund, and was not intended to limit it; and the intention should control the letter. (44 Mo., 283.)

II. But for the act of March, 1868, undoubtedly this sum when paid in would have belonged to the State interest fund, as provided by the General Statutes; but the act of 1868 worked a repeal of the General Statutes, so far as the purchase money of the St. Louis & Iron Mountain R. R. and the Cairo & Fulton R. R. were concerned, and appropriated this fund to the building of the Arkansas branch of the St. Louis & Iron Mountain R. R.

H. Clay Ewing, Attorney General, for Respondent.

I. There is no room for construction of the law. (18 Ohio St., 456; 42 N. Y., 259; 44 Mo., 283; 35 Cal.,634; 54 Penn., 86 and 180; 6 Wallace, 458.)

II. The 40,458 dollars having been derived from the sale of railroads and paid into the treasury, was required by the statute, (W. S., 1281, §§ 1, 3,) to be placed in the interest fund. It was so placed, and it is now inviolable. It has long since been appropriated to the payment of interest on State bonds. There is no law by which it can be drawn from the treasury, except for the purpose of paying State railroad bonds or interest.

WAGNER, Judge, delivered the opinion of the court.

The relator prays for a mandamus to compel the State Auditor to draw his warrant for certain moneys, which, it is alleged, it is entitled to. The controversy grows out of the law confirming the railroad sale to Thomas Allen and his associates, approved March 17th, 1868. (Laws of 1868, p. 95.) The Cairo and Fulton R. R. and the St. Louis and Iron Mountain R. R. were sold by the State, the first for $350,000, and the second for $550,000, aggregating $900,000. At the close of the contracts of purchase in January, 1867, the purchasers

paid $225,700 of the purchase money, leaving a balance of $674,300 to be paid on time, as provided for in the law by which the sale was made. Thomas Allen purchased from the vendees of the State, and took upon himself the obligations of the vendees of the State, and in January 1868, paid into the State Treasury the interest on this balance for the preceding year.

The act of 1868 above referred to, was then passed, and subsequent to its passage, Allen paid into the treasury another year's interest, amounting to $40,458.

This interest was placed in the State interest fund, and has been used in the payment of the railroad indebtedness of the State.

The 8th section of the act is as follows: "It is further provided, that the unpaid balance now due, or hereafter to become due, to the State for the purchase of the St. Louis and Iron Mountain R. R., and for the purchase of the Cairo and Fulton R. R. from Mr. Allen and his associates, to the amount of six hundred and sixty-four thousand three hundred dollars, ($664,300,) together with all interest that may accrue thereon, be and the same is hereby appropriated to the building of a railroad from Pilot Knob to the State of Arkansas; said funds to be applied as may be provided for by law."

Under the provision of law the amount of $664,300 has been drawn from the State Treasury.

And it is now contended that there was a mistake in designating that sum; that it was the intention of the Legislature to appropriate the whole of the unpaid balance of $674,300, and that the petitioner is entitled to the additional $10,000, and also the interest which was paid into the Treasury and not paid back.

The first point is certainly against the petitioner. The Legislature appropriated the unpaid balance, to the amount of $664,300, they have clearly and definitely fixed the sum, and we have no right to assume that they meant any other or different amount.

The language is plain and certain, and there is no room left for construction.

As to the second question: By the statute it is provided, that all proceeds from the sales of railroads, shall be paid into the Treasury, to the credit of the State interest fund, and this fund shall be set apart by the Treasurer, and it is pledged for the payment of the interest and the redemption of the bonds of the consolidated railroad indebtedness. (2 W. S., 1281, § 1, 3.)

The money here in controversy, proceeded from the sale of railroads, and therefore it was the duty of the Treasurer to apply it to the State interest and sinking fund. Having been so applied, the officers have no further control over it. If the petitioner is entitled to the money, the Legislature must be sought to furnish the remedy, and not the court.

It follows that the writ must be dismissed. All the Judges concurring.

RUFUS DANFORTH, Respondent, *vs.* WILLIAM LOWE, Appellant.

1. *Judgment—Reinstatement of cause after lapse of term.*—After the term at which final judgment in a cause is rendered, has elapsed, the court has no power to reinstate the cause upon the docket, or to take any further steps. And motions for new trial and in arrest filed for the first time at the subsequent term, are *coram non judice*, and must be disregarded, notwithstanding such reinstatement. [W. S., 1059, §§ 6, 11.]

Appeal from Johnson Court of Common Pleas.

Elliot & Blodgett, for Appellant.

Crittenden and Cockrell, for Respondent, cited, 11 Mo., 117; 1 Clark, (Iowa,) 571.

WAGNER, Judge, delivered the opinion of the court.

This was an action commenced on an open account.

A trial was had at the regular September Term of the court, 1871, which resulted in a verdict for plaintiff, upon which judgment was rendered in his favor. At that term no motion was filed for a new trial, no bill of exceptions was

made out, and no efforts were made to appeal the case. At the next succeeding term, the appellant moved the court to reinstate the case on the docket, which motion was sustained. A motion was then filed for a new trial, and in arrest of judgment, both of which being overruled, the appellant then presented his bill of exceptions, and took an appeal.

The action of the court was irregular and unauthorized. After the term had elapsed, at which final judgment was taken, the court possessed no further control or jurisdiction over the case. It then had no power to reinstate the cause on the docket, or to take any further proceedings.

The statute requires that all motions for re-hearing and in arrest, shall be filed within four days after the trial, if the term shall so long continue; and if not, then before the end of the term; and it further provides, that no appeal shall be allowed, unless made during the term at which the judgment or decision appealed from, was given. (W. S., 1059, § 6–11.) There was no attempt made to comply with the law at the trial term, as regards taking the appeal.

When the cause was reinstated, there was no new trial, but it seems to have been again placed on the docket, solely for the benefit of the appellant, to enable him to supply an omission, and do what he neglected to do, when the case was properly before the court.

The reinstating the cause, the filing of the motion for a new trial, and granting the appeal, were all acts done, *coram non judice*, and must be disregarded.

Wherefore the judgment must be affirmed. Judges Vories and Sherwood concur; Judges Adams and Napton not sitting.

WILLIAM M. MORGAN, Defendant in Error, *vs.* FREDERICK BOUSE, Plaintiff in Error.

1. *Practice, civil—Demurrer as to cause of action must specify what.*—Where plaintiff states no cause of action whatever, a demurrer merely alleging that the petition "does not state facts sufficient to constitute a cause of action," without further specifying in what particulars the pleading is defective, is nevertheless a good demurrer. But where the petition states a cause of action, a demurrer which goes to some minor, and not necessarily fatal imperfections must specifically state them.
2. *Execution—What estate vendible under—Purchase—Possession—Specific performance.*—The purchaser of land who has paid the purchase money and taken possession, has an estate therein which is vendible on execution, notwithstanding the fact that by mistake the deed described other land. And the purchaser at the execution sale will succeed to all the rights which the judgment debtor had, to sue the original grantor for specific performance or reformation of the deed.

Error to Henry Court of Common Pleas.

J. Ladue, for Plaintiff in Error.

I. Defendant in the execution had no equity which was vendible by execution sale. (Rogers vs. Carey, and authorities there cited, 47 Mo., 232.)

II. "A sheriff's deed operates only on the existing title, and does not pass a subsequently acquired title." (White vs. Davis, 50 Mo., 333.)

McBeth & Price, for Defendant in Error.

I. The statute is imperative that "the demurrer shall distinctly specify the grounds of objection;" and unless it does so, the demurrer "should" be disregarded. (See McClurg vs. Phillips, 49 Mo. 315; Alnutt vs. Leper, 48 Mo., 319.)

II. The petition alleges that plaintiff in error purchased the land, paid the purchase money, and was in the actual possession of the lands. Hence, he had an interest in the lands subject to sale on execution.

III. Jones & Eli were trustees of Bouse, holding the bare legal title for him; (Hill Trust. side page 171, also Sto. Eq. Jur., Vol. 1, § 790, 2nd. Vol. § 1212,) and Morgan at the execution sale became subrogated to his right; and Jones and Eli became trustees of Morgan. (Rankin vs. Harper, 23

Mo., 579; Dunnica vs. Coy, 24 Mo., 167; Phillips vs. Edmonson, 17 Mo., 579; Hatch vs. Wagner, 15 Ill., 127.)

SHERWOOD, Judge delivered the opinion of the court.

Morgan filed his petition in the nature of a bill in chancery in the Henry County Court of Common Pleas against Bouse, alleging in substance that the latter had in the year 1860, purchased certain land of one Jones and of Eli, had paid the purchase money and taken possession of the land so purchased, but that by mistake, Jones and Eli failed to convey the land actually purchased, and taken possession of, but conveyed other and different land, which neither Jones nor Eli intended to sell nor Bouse intended to buy; that in 1863, judgment was rendered in the Henry Circuit Court in favor of Blanton and against Bouse, for a certain sum; that execution issued on that judgment, and was levied on the land, which defendant had purchased, and of which he was at the rendition of the judgment in the actual possession, and the same was sold under said execution and levy, while defendant was still in the possession; that at such sale, plaintiff became the purchaser of all the right title, estate and interest of defendant in the land, and shortly after, receiving a sheriff's deed therefor, entered into the peaceable possession of the land so purchased by him at execution sale; that defendant never had had recorded the deeds which he procured from Jones and Eli at the time of his purchase in 1860; but long after plaintiff had taken possession of the land purchased by him, at sheriff's sale, the defendant surrendered to Jones and Eli, the deeds which misdescribed the land, and for the original, and for no additional consideration, received from them new deeds containing a correct description of the land actually bought by the defendant, being the same land of which he had under his purchase taken possession, as above recited; that the deeds last mentioned were executed by Jones and Eli, for the purpose of correcting the mistakes in the deeds which were surrendered. The petition concludes with a prayer, that defendant be compelled to convey to plaintiff, the legal title

thus by him acquired, and in default thereof, that the court would accomplish the same end by its decree. To this petition, the defendant demurred, assigning substantially as grounds therefor: First—That there were no equities in the petition, which entitled the plaintiff to the relief prayed for; Second—That the petition showed that the defendant, at the time of the execution sale, had no interest in the land which could be sold under execution sale; Third.—That it appeared from the face of the petition, that it stated no facts sufficient to constitute a cause of action. The petition was held sufficient, and the defendant declining to plead further, a final decree was entered for plaintiff, to reverse which this cause comes here on writ of error. There was nothing objectionable in the demurrer, as to matter of form, and it sufficiently raised the points which the pleader was desirous of having considered. When the petition fails to state a cause of action, a demurrer assigning this ground, in the language of the statute, has been held sufficient. (Bank of Mo. vs. Haden, 35 Mo., 358.) If, however, the petition does state a cause of action, objections which go to some minor and not necessarily fatal imperfection, will, in order to meet the requirements of the statute, have to be specifically stated.

Our statute respecting executions, subjects to levy "all real estate whereof the defendant or any person for his use was seized in law or equity, at the time of the issue and levy of the attachment or rendition of the judgment, whereon execution issued, or at any time thereafter."

Bouse, as the demurrer confesses to be true, was in the possession of the land in controversy, and had been in possession of the same for years as the owner, and was thus in possession at the time of the sale under execution. There is no doubt but that a mere barren equity, or "equitable chose in action" unaccompanied by possession of the land, would not render that land vendible under execution, as the property of him whose rights were of such a shadowy and intangible character. This was so ruled in McIlvain vs. Smith, 42 Mo., 45, and in that case, it is expressly said, that Smith had no

possession or seizin of the land, no power to dispose of any estate in it, or in any way to enjoy its occupancy, collect its rents, nor could he call upon the trustee to execute a conveyance to him.

In Broadwell vs. Yantis, 10 Mo., 398., Nolly at one time had an equitable interest in certain lots, but previous to the judgment of Henderson, Nolly had sold his equitable title to the lots, and delivered possession to Yantis, and Yantis to Farrar, so that Nolly had neither possession nor interest, legal or equitable in the lots. And the Court in that case, well laid down this test: "There must be an interest in land which a court of law can protect or enforce, in order that it may be subject to the lien of a judgment and execution."

But a far different case, one widely distinguishable from those above referred to, is presented by this record. Here Bouse at the time Morgan's rights accrued, had paid the purchase money for, and gone into the possession of, the land which he had purchased, was in position to compel deeds from his grantors, or have reformation of those originally delivered to him; had such an interest in the land as would have been in the purview of a court of equity, devisable or descendible as real estate, (2nd Vol. Sto., Eq. Jur., §§ 790 and 1212), and could have protected his rights in the premises, by resort to either legal or equitable procedure, in accordance with the exigencies of the case, and the nature of the redress or relief demanded.

The case of Rogers vs. Carey, 47 Mo., 232, cited by counsel for plaintiff in error, is totally dissimilar to the one under consideration. That was an action of ejectment brought by one who had acquired the debtor's interest to the land under execution sale, and afterwards obtained from the original grantor, Alexander, (who it seems had made a mistake in the description of the land sold, in his first deed) a deed to the original grantees correctly describing the premises sold, and the court there held, that the only question necessarily involved in the record, was a question of delivery; and as the grantees Carey and Stevens had refused to receive the new deeds, and thereby disclaimed all

interest in the land, the fact that Alexander executed a deed to them, which was never delivered, would not amount to such a constructive delivery as would enable the purchaser at sheriff's sale, to maintain ejectment.

And the opinion in that case, also shows that the court did not consider it necessary to pass upon the vendibility of the debtor's interest under execution, (though citing a number of adjudicated cases in the State where such interests were held, thus vendible): nor upon the question whether the purchaser at judicial sale obtained by his purchase, an equity which could be enforced by proper proceedings. But so often as this court has passed upon the question, its decisions speak but the one language; that wherever a party is in such a situation, with regard to land, as to be entitled to a decree, for specific performance, he then has such an interest therein as may be transferred by execution sale. And as a matter of course, when the law once annexes to the debtor's interest in land, the incident of transferability, it must manifestly follow, that the purchaser will immediately succeed to, and occupy the status of him, whose estate the sheriff's deed, purports to convey; otherwise the statute, respecting execution sales, would be utterly inoperative, so far as regards equitable interests in lands. Nor does it at all alter the aspect of the case we are considering, that there was a mistake made in the deeds from Jones and Eli, to Bouse; the only effect of that was, to multiply the equities of the latter, to add to his claim for specific performance, a right to a reformation of the conveyances.

For these reasons the demurrer was properly overruled, and the judgment will be affirmed. Judge Adams absent; the other judges concur.

Cary A. Jamison, Respondent, *vs.* The City of Springfield, Appellant.

1. *Land Commissioner—Condemnation of land—Assessment of damages—Separate action for.*—The verdict of a Land Commissioner's Jury awarding damages to the owner of land condemned for public use, is not exclusive of other remedies, where the Charter provides no method of coercing payment from the City of the sum awarded. In such case the land owner may, notwithstanding such verdict, bring his independent action against the City for the assessment and recovery of damages.
2. *Land Commissioner—Attempt to agree as to compensation—Assessment of damages to each property holder.*—Where a City Charter provides, that in condemning private property for public use, "if the amount of the compensation cannot be agreed upon, the Mayor shall cause the same to be assessed by a Jury," etc., but the record of the proceedings before the Land Commissioner shows no attempt on the part of the City to agree with the land owner as to such compensation; and where the record shows that the Mayor impanneled the Jury "to assess the damages to each and every property holder;" but further recites that the Jury simply stated in their finding, "that no private property holder sustained any damage," etc. *Held*, that such proceedings are wholly insufficient to divest the land owner of his title to the property. (See Anderson vs. City of St. Louis, 47 Mo., 479; Leslie vs. City, etc., *Id.* 474.)
3. *Land, condemnation of—Claim for damages caused by bringing street near door of plaintiff, etc.*—In suit against a City corporation for damages caused by the condemnation of a part of his lot of ground, he cannot claim compensation for "the damage and inconvenience caused plaintiff by bringing the street near his door." The measure of damages in such a case is the fair and reasonable value of the land taken.

Appeal from Greene Circuit Court.

Crawford & Cravens, for Appellant.

I. The matter in controversy was *res adjudicata* at the commencement of this suit.

II. If the respondent was aggrieved by the verdict of the Mayor's Jury, he had a complete and adequate remedy by *certiorari* and he should have pursued it. (49 Mo., 132; 45 *Id.* 361; Anderson vs. City of St. Louis, 47 Mo., 479; Ewing vs. St. Louis, 5 Wall, 413; 47 Mo., 474; 8 Wend., 47; 2 Bac. Abr., 162; 5 Binny R., 27; 8 Greenl'f, 293; 11 Mass., 466; 2 Yerger, 173.)

J. P. Ellis, for Respondent.

I. Where no adequate remedy is provided by the charter as in the present case, the common law right of action remains unaltered. (Soulard vs. City of St. Louis, 36 Mo., 546.)

II. Plaintiff had no right to the writ of *certiorari*. If the proceedings were void as to plaintiff, the writ would have been idle, for void proceedings can bar no action. But *certiorari* only brings up the record for review—what record was there in this cause? Only the written verdict of the Jury. To give plaintiff a remedy, it was necessary that evidence be taken of damages and benefits. This could not have been done on *certiorari*. (Ewing vs. St. Louis, 5 Wall., 418.)

Plaintiff being a stranger, not a party to the proceeding, would have had no right to the writ. *Certiorari* would give no remedy. Supposing on *certiorari*, the court had set aside the finding of the Mayor's Jury, still plaintiff could institute no proceeding to recover compensation unless in the present form of trespass. In other words, *certiorari* might enable him to set aside the verdict, but not to recover his compensation.

III. By the first Section of Article 9, of the City Charter, p. 309, special acts 155, it was only when the amount of compensation could not be agreed upon, that the city had the power to condemn. No proof was offered that an attempt to come to an agreement between plaintiff and defendant was ever made.

This was an essential precedent to the exercise of the power without which the proceedings were void. (Anderson vs. City of St. Louis, 47 Mo., 479.) In the case last cited, the court holds, that when the taking of property is unauthorized, that ejectment will lie, and hence we say tresspass will also lie.

Vories, Judge, delivered the opinion of the court.

It is charged by the petition in this case that the plaintiff was on the — day of March, 1870, the owner of and in possession of a lot of ground in the City of Springfield, in Greene county, (which said land is particularly set forth in

the petition,) which said lot and land then was and now is situate upon and adjoining the north side of Walnut street, in said city; that defendant on, and for a long time previous thereto, was and is an incorporated city duly incorporated, &c.; and, as such, having power to open, alter, widen, vacate, extend or establish streets for public use within its corporate limits, and to take and appropriate necessary amounts of real estate or private property therefor, upon making just compensation to the owners thereof; that on the day and year first aforesaid, the defendant having previously opened and widened said Walnut street, by an ordinance approved January 18th, 1870, in the manner therein described in compliance with said ordinance, proceeded to appropriate and did appropriate a strip of land lying along the south side of the lot and land aforesaid, and extending the whole length thereof and being a part thereof; said strip being six feet wide at the east end and nine feet wide at the west end thereof; that the defendant has wholly failed and neglected and refused to compensate plaintiff for the said strip of land so appropriated, and still refuses to compensate plaintiff therefor; that in consequence of the appropriation of said strip of land by the defendant, plaintiff is damaged in the sum of five hundred dollars, for which judgment is prayed.

The defendant by its answer admits its incorporation as a city with the powers stated in the petition. It avers that the city council of said city, by virtue of the authority in its charter, passed the ordinance specified in the petition to widen and extend Walnut street west from South street to the city limits; that in pursuance of said charter, its Mayor caused a jury of six men, who were disinterested freeholders of the city, to be impanneled and sworn to assess the damages to each and every private property holder on said street, whose property was taken and appropriated to public use by widening and extending said Walnut street; that said Jury made their report and returned the same to the Mayor of the city in writing, signed by said jury; that said report or inquest

so returned, stated that no private property holder on said street sustained any damage by reason of the widening and extending said street, except John Woods; which view and report included the street running south of the plaintiff's property in the petition.

Wherefore defendant says that plaintiff has no right of action against defendant, and judgment is prayed.

A trial was afterwards had upon the pleadings, and after the evidence was heard, the jury returned a verdict for the plaintiff for three hundred dollars, upon which judgment was rendered.

It is shown by a bill of exceptions in the cause, that the parties admit that the verdict of the jury as to the amount of damages found for the plaintiff under the instructions of the court, is supported by the evidence. After the plaintiff had closed the case on his part, the defendant introduced witnesses by whom he offered to prove, that they had served on a jury awarded by the Mayor of the city, for the purpose of assessing damages to the plaintiff for opening the street in front of plaintiff's premises, and that they viewed said premises as jurors, under oath, and that after taking into consideration the advantages and disadvantages to plaintiff in widening said street, they found that he was entitled to no damages or compensation from the city.

This evidence was objected to by the plaintiff. The court sustained the objection, and the defendant excepted. The defendant then offered to prove, by the inquest in writing, of said jury sworn to assess the damages aforesaid, that the provisions of the city charter of defendant had been complied with, and that the said jury had determined under oath that said plaintiff was not entitled to any compensation for the land taken as aforesaid, and that plaintiff failed to apply to the mayor within ten days after the return of said inquest, and show any good cause, or any cause whatever, why said inquest should be set aside, and a new assessment awarded. To the introduction of this last evidence, the plaintiff also objected, which objection being sustained, defendant again excepted.

The foregoing being all of the evidence given or offered in the case, the plaintiff at the close of the evidence, asked the court to instruct the jury as follows:

"In estimating the damages done plaintiff in taking land for street purposes, the jury have the right to consider the amount of land taken, its location, the trees, shrubbery and other things situate upon it, the damage and inconvenience of plaintiff by bringing the street up near the door of the plaintiff, and all the other facts connected with the taking of the property."

To the giving of this instruction, the defendant objected, and his objection being overruled, he again excepted. The court was requested by the defendant to instruct the jury as follows:

1st. "That if they find from the pleadings in this case or from the evidence, that the land taken from the plaintiff, and appropriated to the street, was so taken or appropriated in pursuance of an ordinance of the city council, under and by virtue of the city charter, and that a jury of six disinterested persons, freeholders of said city, proceeded to assess compensation therefor, their verdict is conclusive in the matter unless the mayor of the city on good cause shown within ten days after such inquest of the jury, set the same aside."

2nd. "It devolves on the plaintiff to prove to the satisfaction of the jury, that the property mentioned in his petition, was appropriated by the city, and the damage occasioned thereby; and if he fails to do either, they must find for the defendant."

3rd. "If the jury believe from the testimony taken in connection with all the facts and circumstances, that plaintiff was not injured by the appropriation of the strip of ground, described in straightening Walnut street in front of plaintiff's lot, they will find for defendant."

The court refused to give the instruction numbered one, but gave those numbered two and three. To the refusal to give instruction numbered one by the court, the defendant at the time excepted. After the judgment had been rendered against

the defendant, it moved the court to set aside the verdict, and to grant a new trial for the reasons, that the verdict of the jury was against the evidence, because the verdict was contrary to the instructions of the court, and because the court erred in giving and refusing instructions.

This motion being overruled, the defendant again excepted.

The defendant then filed a motion in arrest of the judgment, because the answer of the defendant constituted a complete defense to the plaintiff's action, and it was not replied to, because the court had no jurisdiction of the subject of the action; because the remedy furnished the defendant by the city charter is exclusive, and because the petition does not state facts sufficient to constitute a cause of action. This motion also being overruled, the plaintiff again excepted, and appealed to this court.

It is insisted by the appellant in this court, that the court below had no jurisdiction of the case; that the mode pointed out by the statute for the condemnation of land for street purposes, and the manner of ascertaining the value of the property taken, and the payment of the price therefor in the charter of defendant, is exclusive, and that the plaintiff had no remedy when his property was taken for street purposes, but to follow the mode pointed out in the charter. In answer to this, it is only necessary to say that the charter of defendant affords no remedy to the plaintiff, where his property is unlawfully taken for street purposes, or for other public purposes. A means is provided by which the city can ascertain the value of property desired for said purposes, and then can take the property without the consent of the owner by paying the value thus ascertained; but if the city should take the property and refuse to pay the owner, no means is furnished by the charter by which he can enforce the provisions of the statute, or compel the city to pay for the property; but the owner is left to his action of trespass or other common law remedy for redress. (Soulard vs. City of St. Louis, 36 Mo. 546, and cases cited.) The petition in the case under consideration is substantially the same as the one in the case just cited, which was held to be good, and to sufficiently set out the cause of action

It is also contended by the appellant that it in its answer, set up a good and sufficient defense to the plaintiff's petition; that no replication was filed to the answer; that it was therefore admitted and judgment should have been rendered in favor of the defendant. The answer attempts to set up a condemnation of the property sued for by the city authorities under the charter. The charter provides: "§ 1. Where it shall be necessary to take private property for opening, widening or altering any public street, lane, avenue or alley, the corporation shall make a just compensation therefor to the person whose property is so taken; and if the amount of such compensation cannot be agreed upon, the mayor shall cause the same to be assessed by a jury of six disinterested persons freeholders of the city.

§ 3. All persons impanneled to inquire into the amount of benefits or damages which shall happen to the owner of the property, proposed to be taken for opening, widening or altering any street, lane, avenue or alley, shall first be sworn to that effect, and shall return to the mayor, their inquest in writing signed by each juror." (Sess. Acts 1855, p. 309.)

There is no provision in the charter requiring any notice to be given to the owners of property about to be taken for public use, that an inquest is to be taken to ascertain the damages to be sustained, so that the proceedings under this law may be wholly *ex parte*. It is therefore incumbent on the city when it claims to have acquired title to property, or to have divested the owner of the title to his land, to show that it has followed the statute in the most literal and strict manner. In the case under consideration, the answer of the defendant attempts to set up a compliance with the statute; but it is not pretended in the answer that any effort had ever been made to agree with the plaintiff as to the compensation to be paid him for his land, or that the plaintiff ever had any opportunity to agree or make any arrangement in reference thereto; but for aught that appears, the plaintiff knew nothing of the matter. It is not even shown that the plaintiff had any knowledge that the city wanted his land for street purposes,

but it is simply stated that the mayor of the city impanneled six freeholders of the city, as a jury, to assess the damages to each and every property holder on the street whose property was appropriated, &c., and—from the showing of the answer—the jury failed to assess the damages to each property holder as directed, but simply made a report, stating that no private property holder on said "Walnut street," sustained any damage by reason of widening said street except John Woods. For aught that appears, the plaintiff's property might never have been considered at all This proceeding as stated in the answer, is wholly insufficient to divest plaintiff of the title to his property, and is therefore no defense to plaintiff's action. (Anderson vs. City of St. Louis, 47 Mo., 479,; Leslie vs. City of St. Louis, *Id.*, 474.)

It follows that it was unnecessary for the plaintiff to file any reply to said answer as it set up no valid defense, and the court therefore committed no error in excluding the evidence to support the answer, and in refusing the instruction asked.

The only remaining question to be noticed is as to the instructions given to the jury in reference to the measure of damages to be assessed in the case. The jury were told that in the assessment of the damages to plaintiff for the appropriation of his land by the defendant, they should consider not only the location of the land, the trees, shrubbery, and other things thereon; but also the damage and inconvenience to plaintiff by bringing the street near his door, and all other facts connected with the taking of property. This instruction was calculated to mislead the jury, and ought not to have been given. The defendant in this case had appropriated plaintiff's land to a public use by adding a part of it to a public street. The city is authorized to appropriate the land to said purpose by following the requirements of the law. This it had not done, and could not acquire any title to the land thereby or to the use of it without the consent of the plaintiff. The plaintiff by the bringing of this suit for damages for the lands taken, impliedly at least, consented to the public use of his land for the purposes of widening the street, which carried

with it his consent to the inconvenience which the widening of the street would be to his other property. The measure of the damages in such case is the fair and reasonable value of the land taken." This was held to be the measure of damages in a case exactly similar in principle to the one under consideration, after a very full consideration of the subject. (See Soulard vs. City of St. Louis, 36 Mo., 546, above referred to, and authorities there cited.) By the instruction given, the jury were led to believe that other damages beside the reasonable value of the land taken were proper to be taken into their consideration in finding their verdict. For this error of the court in so instructing the jury, the judgment must be reversed.

Judges Adams and Napton were absent. The other Judges concurring, the judgment is reversed, and the cause remanded.

CHARLES G. HOPKINS, Respondent, *vs.* HENRY R. SEIGER, Appellant.

1. *Certiorari, writ of—Kansas City Court of Common Pleas.*—Since the act of 1859 (Sess. Acts 1859–60, p. 10,) the Clerk of the Kansas City Court of Common Pleas has had authority to issue the writ of *certiorari*.

Appeal from Jackson Circuit Court.

Gage & Ladd, for Appellant.

J. Brown Hovey, for Respondent.

SHERWOOD, Judge, delivered the opinion of the court.

This was a suit brought in the Circuit Court of Jackson county, by Charles G. Hopkins against Henry R. Seiger, upon the following bond:

"We, Joseph E. Snyder as principal, and Henry R. Seiger as surety, acknowledge ourselves indebted to Charles G. Hopkins, in the sum of four hundred dollars, ($400.00) upon this condition: Whereas the said Joseph E. Snyder, has prayed a writ of *certiorari*, directed to Elisha B. Cravens, a Justice

of the Peace for Jackson county, requiring the said justice to certify to the Kansas City Court of Common Pleas, the record, proceedings and papers in a certain case of unlawful detainer pending before said justice, wherein Charles G. Hopkins is plaintiff, and Joseph E. Snyder is defendant, now if the said Joseph E. Snyder shall commit, nor suffer any waste or damage to be committed on the premises sued for, and shall pay all rents and profits, damages and costs that may be adjudged against him, and otherwise abide the judgment of the said Kansas City Court of Common Pleas, then this recognizance shall be void.

Witness our hands this 27th day of April, A. D., 1866.

JOSEPH E. SNYDER,
HENRY R. SEIGER.

Approved April 27th, 1866.

CHAS. H. VINCENT, Clerk;"

which with the necessary affidavit had been filed with the Clerk of the Kansas City Court of Common Pleas. The Clerk thereupon issued a *certiorari* to the justice, by whom the papers in the cause were transmitted to the clerk, and afterwards the cause was taken in the usual way by change of venue to the Circuit Court of Jackson county, where a judgment was rendered against Snyder for the possession of the premises in controversy and $450.00 damages.

Snyder failing to pay the damages thus assessed, Hopkins brought the present suit against Seiger on the recognizance, and recovered judgment, and the only question to be determined, is whether the Clerk of the Common Pleas Court had authority to issue the writ of *certiorari*.

Under the general law it is very clear that such authority in proceedings for forcible entry and detainer, and unlawful detainer, is only conferred on Clerks of the Circuit Court, and had the law (Local Acts 1855, p. 60,) creating the Kansas City Court of Common Pleas remained unchanged by amendment, such authority would still exclusively belong to the officer on whom it was originally conferred. But by the fifth section of an act amendatory of the one above referred to,

approved December 5th, 1859, (See Sess. Acts 1859, '60, p. 10,) it is provided, that: "The Clerk of said Court shall in all things be regulated by the law regulating the duties of Clerks of Circuit Courts."

This section I regard as decisive of the question under discussion, and that it leaves no room to doubt that the writ of *certiorari* was properly issued by an officer duly authorized by law so to do. The judgment is, therefore, with the concurrence of Judges Vories and Wagner, affirmed.

Judges Napton and Adams absent.

STATE OF MISSOURI, Respondent, *vs.* FERDINAND SAUNDERS, Appellant.

1. *Criminal law—Failure to plead, fatal after verdict.*—Where, in a criminal proceeding no plea to the accusation is entered on behalf of the prisoner, such fact will prove fatal after verdict. The error cannot then be cured by entry of plea *nunc pro tunc*.

Appeal from Lafayette Circuit Court.

H. C. Wallace, for Appellant.

I. The court erred in sustaining the motion for an entry of "not guilty"—"*nunc pro tunc*."

Our Statute, (W. S., 1095, § 5,) peremptorily requires the plea of "not guilty" to be entered for a defendant at the time of, or when he "shall be arraigned upon any indictment" —if he deny the charge in any form, or require a trial, or if he refuse to plead or answer, and in all cases, when he does not confess the indictment to be true. Sec. 1, Art. 11, p. 1101, W. S. provides, that "all issues of fact in any criminal cause, shall be tried by a jury." Until this plea is entered, there is no issue to be tried, and there can be no trial. (Maeder vs. State, 11 Mo., 363; Thomas vs. State, 6 Mo., 457; Ross vs. State, 9 Mo., 687; State vs. Andrews, 27 Mo., 267.) Even when the cause had been tried by the court, the

judgment was reversed, because the plea of "not guilty" was not entered. (*Ib.*, p. 268.)

The case of the State vs. Weber, 22 Mo., 321 in no wise militates against, but confirms and supports the position here taken. There, after the trial had progressed and the State had examined in chief the first witness, it was discovered that defendant had not been formally arraigned. Thereupon, the court ordered that the defendant should be formally arraigned, which was done accordingly; and, thereupon, the defendant pleaded "not guilty." In the case at bar, it was never discovered that the defendant had not been arraigned and had not pleaded "not guilty," until the next day after the jury was discharged, nor until defendant filed his motion in arrest on this and other grounds.

The decision in the case of State vs. Andrews, 27 Mo., 267, later than State vs. Weber, 22 Mo., *supra*, shows, that this court did not intend to dispense with or qualify the requirements of the statute as to this plea of "not guilty." (See also, State vs. Braunschweig, 36 Mo., 397; and State vs. Mathews, 20 Mo., 55.)

The court below had no authority to enter the plea of "not guilty." It did not "judicially appear of record," that defendant had pleaded "not guilty" as required in State vs. Weber, 22 Mo., 321. (Thompson vs. Miller, 2 Stew., 470; Hyde vs. Curling, 10 Mo., 359; 15 Ind., 73; 3 Cal., 255.)

Such facts could not be shown by *parol*, and even that was not done or attempted in this case. (Benford vs. Daniels, 13 Ala., 667; Turner Ex'r., vs. Christy, 50 Mo., 145; Gibson vs. Chouteau's heirs, 45 Mo., 171; 40 Ala., 596.)

H. Clay Ewing, Attorney General, for Respondent.

I. It was competent for the court to have the plea of "not guilty," entered after trial. It was at the same term of court. The defendant had gone to trial, and he could by no possibility suffer detriment by the practice. (1 Ch. Cr. Law, 720; Berrian vs. State, 2 Zab., 9; Harman vs. State, 11 Ind., 311.)

II. Defendant exercised his right of challenge, and announced himself ready for trial, and the jury was sworn.

WAGNER, Judge, delivered the opinion of the court.

The accused was indicted for murder in the first degree, and upon a trial, was convicted of the offense of murder in the second degree. After verdict, a motion was made for a new trial, and also in arrest of judgment—both of which motions were overruled. The principal reason assigned in the motion in arrest, was, that the record did not show that the defendant was ever arraigned, or that a plea of not guilty was entered. After this motion was made, the prosecuting officer for the State moved to have a plea of not guilty entered of record, *nunc pro tunc*, which the court sustained. But it is admitted that no arraignment ever took place, and that no plea of not guilty was ever entered upon the record. The statute provides, that when any person shall be arraigned upon any indictment, it shall not be necessary to ask him how he will be tried; and if he deny the charge in any form, or require a trial, or if he refuse to plead or answer, and in all cases when he does not confess the indictment to be true, a plea of not guilty shall be entered, and the same proceedings shall be had in all respects, as if he had formally pleaded not guilty. (2 W. S., p. 1095, § 5.)

It is customary and usual to arraign the prisoner, though this need not be done in the solemn manner that was once thought necessary; (State vs. Braunschweig, 36 Mo., 397.) but in all cases where a trial is required, and there is no confession of the allegations of the indictment, the court must enter a plea of not guilty. This is indispensable to make up the issue upon which the defendant is tried.

In the case of the State vs. Weber, 22 Mo., 321, after the prisoner had announced himself ready for trial, and a witness for the prosecution had been examined in chief, it was discovered that the prisoner had never been arraigned, and by order of the court, he was then arraigned and pleaded not guilty; the jury was re-sworn, and the evidence was then taken and the trial proceeded with, and this was held not to be erroneous.

But there the issues were made up, and the jury re-sworn

before any evidence went to them in the case. In the present case, the prisoner was tried throughout without any issue being framed on which a trial could be had. It is evident there was no issue either in form or substance. It was undoubtedly a mere inadvertence on the part of the prosecuting officer, but it is fatal to the proceedings. And as there was no issue made or entered of record, it was not permissible to supply one after verdict. Such a proceeding would be exceedingly dangerous, and we are not willing to sanction it.

It is argued that the court erred in the matter of impanneling the jury, but after a careful examination of the question, we have not found any such error as to justify interference in that respect.

The only other point seriously brought to our attention, is the action of the court in giving the instruction, relating to murder in the second degree. The instruction is copied from one approved by this court in the case of the State vs. Joeckel, 44 Mo., 234, and we have seen no reason for changing the opinion therein expressed.

For the error of permitting the State to enter the plea of not guilty after the verdict was rendered, the judgment will be reversed, and the cause remanded. The other judges concur.

BENJAMIN KITE, Respondent, *vs.* JOHN B. COX, Appellant.

1. *Appeal to Supreme Court, dismissed when.*—Where appellant files no statement or brief, or assignment of errors, the appeal to the Supreme Court will be dismissed.

Appeal from Green Circuit Court.

WAGNER, Judge, delivered the opinion of the court.

In this case the appellant has filed no statement or brief, nor assignment of errors. The appeal therefore will be dismissed.

The other judges concur, except Judge Sherwood who did not sit.

J. HARKNESS, Admr. etc., Respondent, *vs.* S. H. JULIAN, *et al.* Appellants,

1. *Amending pleadings—What amendments do not change nature of claim or defense.*—In suit on a note where the petition alleges that plaintiff is administrator of A., and that the note was executed by defendant to "A.," the pleading may under the Practice Act (W. S., 1035, §§ 3 and 7,) be amended by adding, that the note was transferred from "A" to "B;" that plaintiff sues as the administrator of B. Such amendment does not change the nature of the claim or defense.

Appeal from Green Circuit Court.

Price & Julian, for Appellants.

John P. Ellis, for Respondent.

VORIES, Judge, delivered the opinion of the court.

This action was brought on a promissory note. The plaintiff in his original petition, stated that he was the administrator of the estate of one J. H. Elam, deceased, and described himself in the caption of the petition as such, and charged, that the defendants together with one W. F. McFall by their promissory note dated, etc., for value, had promised to pay said Elam the sum of ninety dollars four months after date, with ten per cent. interest; that fifteen dollars had been paid on said note; that the balance of the note was unpaid; that since the date of the note Elam had died, and that plaintiff had been appointed his administrator, and that the balance due on said note was due him as such; and judgment was prayed.

The defendants Julian and Leathers were served with process. Defendant McFall was not found. The case was returnable to the January term of the Green Circuit Court for the year 1867.

At the return term of the writ, defendant Julian appeared and filed his demurrer to the plaintiff's petition.

The causes of demurrer assigned were: First—That the plaintiff had no legal capacity to sue as administrator of J. H. Elam as the said Elam was yet alive. Second—That petition does not state facts sufficient to constitute a cause of action. This demurrer was sustained by the court and the plaintiff, by leave of

the court, filed an amended petition. In his amended petition, plaintiff describes himself in the caption as the administrator of the estate of John N. Dysart, deceased; and states that defendants by their promissory note, filed, dated, etc., as in the original petition, promised for value to pay J. H. Elam or order, the sum of ninety dollars four months after date with interest, etc.; that the defendants had paid fifteen dollars on said note on the 28th of July, 1862; that the balance of said note is still due; that said Elam, before the maturity of the note, sold and transferred the same to John N. Dysart; that since the transfer and delivery of the note to Dysart, he had died, and that plaintiff had been appointed his administrator, and as such is entitled to the note, and prays judgment for the balance due, etc.

At the January term of said court for the year 1868, the plaintiff dismissed his suit as to the defendant McFall, and on the same day judgment was rendered in the cause against defendants Julian and Leathers. At an adjourned term of the court held in June, 1868, defendant Julian filed a motion to set aside the judgment rendered, and quash the execution in the cause, stating in the motion that he only appeared for the purposes of the motion. This motion was sustained by the court.

At the May term of said court for the year 1871, the court rendered another judgment against said defendants in said cause, in which it is stated that the plaintiff and defendants both appeared and submitted the cause to the court.

This judgment is rendered in favor of plaintiff personally, and not as administrator of Dysart. At the same term of the court, another judgment is rendered against said defendants and in favor of the plaintiff in his representative capacity as administrator of the estate of Dysart. This judgment recites that both plaintiff and defendants appeared by their attorneys, and submitted the cause to the court, etc.

At the November term of said court for the year 1871, the defendants appear and file their motion to quash the execution issued in said cause and to arrest the judgment rendered

therein; because the judgment was rendered without authority of law; because the court had no jurisdiction of the defendants at the time of the rendition of the judgment; because neither of the defendants had been summoned in the cause or had ever appeared to the merits of the case, and because the judgment is not authorized by the pleadings. This motion was heard by the court and overruled. The defendants filed a bill of exceptions, in which they excepted to the opinion of the court in overruling their motion to quash the execution and arrest the judgment. In the bill of exceptions it is stated, that upon the hearing of the motion the following record and proceedings in said cause were had, to-wit: "All of which can be found in the first part of the transcript (see index) which is all of the evidence in the cause upon the hearing of said motion, etc." The defendants excepted to the opinion of the court in overruling their motion and appealed to this court.

The record in this case presents an example of as loose and careless practice as can be found in the records of any case that has come under my observation. The suit is first brought by plaintiff, as administrator of the estate of Elam, the payee of the note sued on. The defendants demurred to this petition on the ground that Elam was still alive and could have no administrator. The plaintiff then, by the permission of the court, files an amended petition by which he describes himself as the administrator of the estate of John N. Dysart, and charges that he is the holder of the note as such. About one year after the filing of this amended petition, the suit is dismissed as to the defendant McFall, and judgment rendered against the other defendants.

In June, 1868, defendant Julian appeared for the purposes of a motion only; and filed a motion to set aside the judgment. This was sustained in May, 1870, two years after the first judgment had been set aside. Another judgment was rendered in favor of the plaintiff in his individual capacity for the amount claimed in the petition, etc. And on the next day another judgment was rendered in favor of plaintiff as administrator of Dysart.

In each of these last judgments it is stated, that both plaintiff and defendants appeared and submitted the case to the court for hearing.

At the next term of the court the motion was filed to quash the execution and arrest the judgment. It is difficult to see exactly what error the defendants relied on for the arrest of the judgment, or for the quashing of the execution, even if the motion to arrest had been filed in time.

It is stated in the motion, that the defendants had not been summoned and had never appeared to the merits; but the record shows, that they were summoned in the usual way, in conformity to the statute, to appear to the original petition, and that defendant Julian did appear and demur to the petition, and that his demurrer was sustained. It cannot be seen from the bill of exceptions, upon what facts the appellants relied, upon the hearing of their motion, to show that the court had no jurisdiction. I infer, however, that they are of the opinion, that as the plaintiff in his amended petition declared against them as the administrator of John N. Dysart, deceased, while the original petition was filed by him as the administrator of J. H. Elam, deceased, that the amendment makes an entirely new case not authorized by law, and that as the plaintiff in the action had been changed, it was an entirely new action, to which they were not bound to appear without new service in the cause; or in other words, that the amendment made was not authorized by law.

Our statute in reference to the amending of pleadings and proceedings provides, that "a petition or answer may be amended by the proper party of course without costs and without prejudice to the proceedings already had, at any time before the answer or reply thereto shall be filed." And also that "the court at any time before final judgment in furtherance of justice, and on such terms as may be proper, may amend any record, pleading, process, etc., by adding or striking out the name of any party, or by correcting any mistake in the name of a party, or a mistake in any other respect, etc.," so that it does not "*sub*

stantially change the claim or defense," etc. (2 W. S., 1034–1035, §§ 3 and 7.)

In the case under consideration, the amendment was made by leave of the court. It was made before answer filed, and it cannot be seen how it changed the nature of the claim or defense. The suit is still founded on the same note. It is still charged, that the note was executed by defendants to Elam, but it is added that it was transferred by Elam to Dysart, and that plaintiff owns it not as the representative of Elam, but of Dysart, it having been originally stated by mistake that the plaintiff was the administrator of Elam who was still alive. It cannot be seen how this amendment could injure the defendants, and I think it comes exactly within the objects of the statute, and that the court properly permitted the amendment. (Thompson vs. Mosely, 29 Mo., 477; Hayden vs. Marmaduke, 19 Mo., 403; Martin vs. Martin, 27 Mo., 227; Wellman's, adm'r vs. Dismukes, 42 Mo., 101.)

The amendment having been properly permitted by the court, and the defendants being properly served with process, it was their duty to answer, if they had any defense to the plaintiff's action; and they cannot now complain, and in fact they do not pretend on their motion, or in, or by any evidence in support of the motion, that they have any defense to the action, or that any injustice has been done them. They seem to rely on a technical construction of the law to set aside the judgment in the case. The defendants file no brief, merely file an assignment of errors, in which the error assigned is, that the court had no jurisdiction for the want of service on defendants, and that judgment is for the wrong party.

It appears from the sheriff's return, that defendants were served with process. One of the defendants appeared and demurred to the original petition, which demurrer was sustained, and the judgment rendered by the court shows, that the defendants appeared by their attorney, and submitted the cause to the court for hearing, and no evidence appears from the bill of exceptions to have been given upon the trial of the motion to show, that the record entries are not correct.

I have treated this case as if the motion to arrest the judgment had been filed in proper time. It was not filed until a subsequent term of the court after the judgment was rendered, but no objection was made on this ground.

There are some irregularities appearing in the record of this case, such as the rendition of two judgments in the case, but these matters are not brought before us, and no point is raised thereon.

The other judges concurring, the judgment of the Green Circuit Court is affirmed. Judge Adams did not sit.

JOHN MORAN, *et al.* Appellants, *vs.* JOHN PLANKINTON, *et al.*, Respondents.

1. *Judgment, final—Appeal.*—A judgment for defendant, which is merely one for costs, is not a final one, and will not authorize an appeal.

Appeal from Jackson Circuit Court.

Johnson & Botsford, and Tichnor & Warner for Appellants.

Wallace, Pratt & Hoff, for Respondents.

SHERWOOD, Judge, delivered the opinion of the court.

This case comes here by appeal from the Jackson Circuit Court, but there is no final judgment. It has been repeatedly decided by this court, that a final judgment in favor of a defendant should conclude in this way:

"It is therefore considered by the court, that the plaintiff take nothing by his writ, that the defendant be discharged and go hence without delay, and have and recover of and from said plaintiff his costs in this behalf expended, and have hereof execution." The only judgment in this record, is one for costs.

Appeal dismissed. Judge Adams absent; the other Judges concur.

STATE OF MISSOURI, Respondent, *vs.* CARROLL BRANNON and W. M. Pitts, Appellants.

1. *Practice, criminal—Verdict set aside—Prisoner held over—Final judgment.* —The action of the court in setting aside the verdict of the jury in a criminal proceeding, where the prisoner is held for another trial, is not a final judgment from which appeal will lie.

Appeal from Henry Circuit Court.

Wilson, Smith & Johnson, for Appellants.

I. The motion to discharge the defendant made in the Circuit Court, and overruled, was such a final judgment as could be brought here by appeal or writ of error. (State vs. Newkirk, 49 Mo., 472, and cases there cited.)

H. Clay Ewing, Attorney General, for Respondent.

I. There is no final judgment in this case, from which an appeal will lie.

WAGNER, Judge, delivered the opinion of the court.

In this case it is obvious there is no final judgment in the court below to support the appeal.

The indictment was found against the defendants for robbery in the first degree, and on a trial they were convicted by the jury of robbery in the second degree.

The jury were then discharged, and the court set aside the verdict, and held the prisoners for another trial. The defendants then filed their motion, praying the court to discharge them from custody on the ground that they had been acquitted of the charge of robbery in the first degree, the crime for which they were indicted. This motion was overruled, and the defendants appealed.

This action of the court was not a final judgment, and did not dispose of the case. It left the prisoners in the custody of the court, subject to its jurisdiction, to be further proceeded with.

In the case of the State vs. Newkirk, (49 Mo., 472,) it was held, that the discharge of a prisoner by the court was a final judgment, and an appeal or writ of error would lie therefrom.

But a discharge puts a final end to the proceedings. It sends the prisoner out of court, and leaves nothing for future action.

In the present case, the prisoners are still held in custody, and the case is still pending against them in court.

The court should not have received the verdict, it was not responsive to the indictment, and the jury should have been informed of that fact, with instructions as to their duty. But the case is not now before us.

The validity of the defendants' detention may be tested on a writ of *habeas corpus*, or if further proceedings are had and a final judgment taken, the question may be examined here on appeal.

The appeal must be dismissed. All the Judges concur.

THE STATE OF MISSOURI, to the use of W. W. BLACKMAN, Respondent, *vs.* ALBERT G. MCCRACKEN, *et al.*, Appellants.

1. *Practice, Supreme Court—Assignment of errors.*—Where appellant files no assignment of errors, the appeal will be dismissed.

Appeal from Greene Circuit Court.

Wm. C. Price and Wright, for Appellants.

Dade & Mitchell, for Respondent.

SHERWOOD, Judge, delivered the opinion of the court.

In this case the appellants having failed to assign errors, the appeal will be dismissed.

Judge Adams absent. The other Judges concur.

STATE OF MISSOURI, Defendant in Error, *vs.* THEODORE S. CASE, Plaintiff in Error.

1. *Insurance companies—Action by superintendent—Statement by company—Averment as to penalty—Insurance Act, § 43.*—In proceedings brought at the instance of the superintendent of insurance, against a fire and marine insurance company, for violating § 23, Art. III, of the insurance law, (W. S. 769,) where the petition uses the language of the statute in describing the statement required to be filed, and charges that said statement was not made and filed "as required by the law," such averment does not render the petition bad on motion in arrest. It is not incumbent on plaintiff to show what the statement is required to contain. The requirements of that statute will be judicially noticed.

For failure to comply with § 23, plaintiff is entitled to the penalty of $500 named in § 43. (State vs. Matthews, 44 Mo., 523.)

Error to the Jackson Circuit Court.

Lay & Belch, with Brown & Case, for Plaintiff in Error.

I. The petition is vague and too indefinite to support a judgment for the violation of a penal statute. It does not clearly state the act complained of, whether there was an entire failure to file a statement, or whether an imperfect statement was filed, which was treated as no statement.

II. Section 43 is so ambiguous and confused, and made to affect so many acts or omissions, that it should not be enforced. (State vs. Boon, 1 Taylor, 246; Cheezen vs. State, 2 Cart., Ind., 149; 27 Ala., 35; Sullivan vs. Adams, 3 Gray, 476; Bl. Comm. 91; Dwar. Stat., 2nd. Ed., 587; 8 Pick., 370; Henry vs. Tilston, 17 Vt., 479; Comm. vs. Slack, 19 Pick., 304; U. S. vs. Fisher, 2 Cranch, 358, 386.)

III. The language of section 43 is conclusive, that the omission to comply with section 23, was not intended to subject the officer to the penalty. "Violation" means an act done, not an omission to act or to do. (2 Bouv. L. Dic., 629.)

IV. Section 43 was not intended to apply to this case. The object of this section, as stated in the case of State vs. Matthews, (44 Mo., 523,) is to give information to a public officer —the superintendent. The legislature having empowered him to obtain this information in manner pointed out in section 13, it was hardly intended to convert him into a common informer, and allow him to proceed in a *qui-tam* action.

H. Clay Ewing, Attorney General, for Defendant in Error.

VORIES, Judge, delivered the opinion of the court.

This action was brought under the 43rd section of the 3rd article of the act to create an insurance department, to recover a penalty for the violation of the 23rd section of said article.

The action was commenced by the circuit attorney of Jackson County, in the name of the State of Missouri, the State suing as well for herself, as for Wyllys King, as informer. The complainant states, that "The Kansas City Fire & Marine Insurance Company, on March 1st, 1869, was, and ever since has been, and now is an existing Insurance Company formed, organized and incorporated under and according to the provisions of chapter number sixty-seven of the General Statutes of the State of Missouri; that the said Kansas City Fire and Marine Insurance Company was so incorporated to do a Fire and Marine Insurance business, that is to say Insurance business other than life assurance business, with its principal office located and being situated in the City of Kansas, in the County of Jackson aforesaid; and on its organization and incorporation as aforesaid, said Kansas City Fire and Marine Insurance Company did commence to do, and ever since has been and still is doing the business of a Fire and Marine Insurance Company, that is to say, an insurance business other than life assurance business, with its principal office located as aforesaid.

On December 1st, 1870, the defendant, Theodore S. Case, was, and ever since has been, and still is, President of the Kansas City Fire and Marine Insurance Company, situated in said county; that the defendant did not on January 1st, 1871, nor within thirty days thereafter, nor at any time since, prepare under oath, and deposit in the office of the superintendent of the Insurance Department of the State of Missouri, the statement made up for the last fiscal year of said Kansas City Fire and Marine Insurance Company, required by and mentioned in section number twenty-three of an act of the

General Assembly of the State of Missouri, entitled, "an act for the incorporation of insurance companies, other than life assurance companies, and for the regulation of insurance business other than life assurance business," approved March 10th, 1869, in manner and form as is specified in said section No. 23; that the superintendent of the Insurance Department of the State of Missouri, in December, 1870, furnished to the defendant, as president of the said Kansas City Fire and Marine Insurance Company, the blank forms for such statement, but no such statement has since been by any one prepared under oath, and deposited in the office of the Superintendent of the Insurance Department of the State of Missouri; that the defendant did in the year, 1871, violate the said act approved March 10th, 1869, in the manner and form aforesaid, contrary to the form of the statute last mentioned; wherefore and by force of the statute last mentioned, and the forty-third section thereof, the defendant is subject to a penalty of five hundred dollars, for which, the same being due and unpaid, plaintiff demands judgment against defendant, one-half of such penalty, when recovered, to be paid into the treasury of said State, and the other half to said Wyllys King, the informer, &c.

A summons was duly issued on this complaint, and served on the defendant.

At the return term named in the summons, the defendant failed to appear in the time required by law, and an interlocutory judgment was taken against him.

Afterwards on the 53rd day of said term, the plaintiff and defendant both appeared and submitted the case to the court without answer and without setting aside the judgment by default before taken.

The court, after being fully advised in the premises, finds that the allegations in the petition are true, and rendered a judgment against defendant as prayed for in the petition.

The defendant then filed a motion to arrest the judgment, setting forth the following reasons why said judgment should be arrested:

1st. Because the law does not warrant such judgment.

2nd. Because the facts stated in the petition do not authorize such judgment.

3rd. Because said petition does not state facts sufficient to constitute any cause of action against the defendant, and is otherwise defective.

This motion being overruled by the court, the defendant excepted, and brings the case here by writ of error.

The only and simple question presented in this case is, does the petition or complaint state facts sufficient to uphold the judgment after the facts have been found by the court and the judgment rendered?

It is insisted by the plaintiff in error, that the petition is too vague and indefinite to support a judgment; that it does not appear in the complaint, whether there was an entire failure to file the statement required, or whether there was an imperfect statement filed which was treated as no statement at all.

It cannot be seen how this matter could affect the case. If a statement had been filed which was imperfect, and did not comply with the law, then in law it was no statement at all, and would be so treated, and the complaint would properly charge in such case that no statement was filed.

The statute requires, that "it shall be the duty of the president or vice-president and secretary, or a majority of the directors, of every insurance company organized under this act, or the laws of this State, annually, on the first day of January, or within thirty days thereafter, to prepare under oath, and deposit in the office of the superintendent of the insurance department, a statement made up for the last fiscal year of said company, showing, &c."

This statement is required to be prepared under oath, and deposited in the office of the superintendent of the insurance department.

The petition charges, that "defendant did not on the first day of January, 1871, nor within thirty days thereafter, nor at any time since, prepare under oath, and deposit in the office of the superintendent of the insurance department of the

State of Missouri, the statement made up for the last fiscal year of said Kansas City Fire and Marine Insurance Company required by, and mentioned in section 23, of Art. III." This charge is as definite as the statute. It uses just the language of the statute in describing the statement required to be filed, and charges that said statement was not made by defendant, and filed as required by the law, and the petition further states, that no such statement has, since December, 1870, been by any one prepared and deposited in the office, &c. I do not see how the complaint could be more specific or certain. If no such statement was ever made up and filed, it is difficult to see how the matter could be more specific than to say so. The law is referred to with certainty; it is a public law; its requirements will be judicially noticed; so that it is not incumbent on the plaintiff to show what the statement is required to contain. And I cannot see how the defendant could have been mislead by the statement used in the petition. In all such cases the pleadings are cured after verdict or judgment on want of answer, and the judgment will not be arrested. (2 W. S., p. 1036.) But in this case I think the statement of the cause of action is good even before verdict.

The next point made by the plaintiff in error is, that the 43rd section of the 3rd article of the act creating an insurance department, under which this action was brought, provides that every violation of this act, shall subject the party violating to a penalty of $500, &c.

It is contended, that the penalty thus provided does not and cannot apply to the 23rd section, before referred to; that the language *violate* never applies to acts of omission, but it means to act or to do, or an act done unlawfully.

This construction of the language is much too narrow and confined. We are told by Webster that commands may be violated negatively by non-observance, and it was evidently in this sense that the language was used by the legislature in the section named.

This construction was given to the 43rd section by this

court, in the case of the State of Missouri vs. Matthews, 44 Mo., 523. And we see no reason now to depart from it.

The judgment of the Jackson Circuit Court will be affirmed. Judges Adams and Napton absent. The other Judges concur.

JOHN PEACHER, ADM'R &C., Plaintiff in Error, *vs.* SALLIE PATRICK, *et al.*, Defendants in Error.

1. *Bill of exceptions—Motion in arrest, not reviewed without.*—In the absence of any bill of exceptions, the Supreme Court will not review the action of the trial court on motion in arrest. Such motion being no part of the record proper, can only be brought up by bill of exceptions.

Error to Boone Circuit Court.

Prewitt & Jones, for Plaintiff in Error.

O. Guitar, for Defendants in Error.

ADAMS, Judge, delivered the opinion of the court.

This was an action under the mechanic's lien law, for lumber provided for a house. There was a finding and judgment in favor of the plaintiff.

A motion in arrest of judgment was filed by the defendants and the judgment was arrested, and a final judgment rendered in favor of the defendants.

The record contains no bill of exceptions. And the clerk in his return to a writ of *certiorari*, certifies that no bill of exceptions was filed.

We are asked to review the judgment of the court on the motion in arrest.

As there was no bill of exceptions saving the points presented by counsel in their briefs, we have no authority to pass on them.

Let the judgment be affirmed. The other Judges concur.

RICHARD P. MILLER, Defendant in Error, *vs.* WM. H. POWELL, Plaintiff in Error.

1. *Deeds—Acknowledgment—Wife's fee—Relinquishment of dower.*—Where the only defect in a certificate of acknowledgment is, that it includes a clause relinquishing the wife's dower, the acknowledgment is sufficient to carry her fee in the land.

Error to Pettis Court of Common Pleas.

Phillips & Vest, for Plaintiff in Error.

Johnson & Botsford, and Sampson & Bro., for Defendant in Error.

ADAMS, Judge, delivered the opinion of the court.

The defendant demurred to the plaintiff's petition, and stood on his demurrer, which was overruled, and final judgment rendered in favor of the plaintiff.

The material allegations of the petition are, that Nancy Edwards was the owner in fee of the northwest quarter, and the west half of the northeast quarter of section eleven, in township forty-five, of range twenty in Pettis county, except sixty acres off from the east part, before sold to Henry Albers; that the said Nancy Edwards and Thomas W. Edwards, her husband, on the 21st day of May, 1866, sold and conveyed to plaintiff, in fee, the above described land; that the officer who took the acknowledgment of Nancy Edwards, inserted in the acknowledgment, that she relinquished her dower in the premises. The deed is referred to in the petition as an exhibit filed therewith, marked "A." But it has not been copied into the record. We infer from the allegations of the petition, that the certificate of acknowledgment was in the regular form of an acknowledgment under the Revised Statutes of 1855 for the relinquishment of the dower of a married woman, but taken and certified by a justice of the peace, under the act of 1864. (See Sess. Acts 1863–4, p. 27.) The plaintiff states in his petition, that the officer took the acknowledgment properly, but by mistake inserted a clause relinquishing dower, and the pleader then states, that in conse-

quence of this mistake, the title in fee did not pass to the plaintiff from Nancy Edwards.

The petition further states, that the defendant afterwards, with full knowledge of this deed to the plaintiff, procured from Nancy Edwards a quit-claim deed for the same land; and a copy of this deed is referred to, as being filed with the petition. The inference is, that this copy was a certified copy from the recorder's office; but it is not contained in the transcript. The petition concludes by praying that this deed to the defendant be set aside, and that whatever title he acquired, may be divested out of him, and invested in the plaintiff.

The ground of demurrer is, that on the face of the plaintiff's petition, no title passed to him, legal or equitable, and therefore the court cannot interfere with the defendant's rights.

It is evident that the attorneys, who drew this petition, did not understand the rights of their client. If the only defect in the certificate of acknowledgment was, that it included a clause relinquishing dower, under repeated decisions of this court, the acknowledgment was sufficient to carry the wife's fee in the land. It is true that in McDaniel vs. Priest, 12 Mo., 545, the court held, that the insertion of a clause relinquishing dower in a deed intended to convey the fee of land vested in a married woman, rendered the conveyance inoperative. But this decision was afterwards reviewed in Chauvin vs. Wagner, 18 Mo.. 531, and expressly overruled.

The doctrine in Chauvin vs. Wagner was afterwards maintained in Delassus vs. Poston, 19 Mo., 425; Perkins vs. Carter, 20 Mo., 465, and Chauvin vs. Lownes, 23 Mo., 223, and must be considered settled as a rule of property in this State.

The Revised Laws of 1865 did not take effect till August, 1836, and therefore this acknowledgment is governed by the law of 1855, under which these decisions were made. Under the law as it now stands, there is no difference in the acknowledgments to be made by a married woman, in conveying the fee or dower; the acknowledgment for either is precisely the same, and the certificate of acknowledgment is the same. This alteration in the law was no doubt made to render it more

simple, and to conform to the decisions of this court, and make a uniform rule in regard to both kinds of acknowledgments. The question however is, did the plaintiff have any standing in court for any purpose. If the form of the acknowledgment rendered the deed void, he would have no right to apply to a court of equity to correct it.

The officer, in taking the acknowledgment, acts under a statutory power, and a court of equity cannot aid the defective execution of such a power. The only remedy would be, to apply to the officer to put his certificate in form, and if he refused to comply he might be compelled to do so by a mandamus. But as we have seen, the insertion of the clause relative to dower did not invalidate the certificate of acknowledgment, as applicable to the conveyance of the fee.

The statement in the petition, that the title did not pass to the plaintiff, in consequence of the alleged defect in the certificate, is a mere conclusion of law, which the allegations of the petition contradict. By these allegations, it is manifest that the legal title in fee did pass to the plaintiff. The object of his petition seems to be to coerce the legal title from defendant. He seeks to recover what he already has. It is not pretended, that if he has the legal title, that the quit-claim deed to the defendant casts a cloud on his title. It is not a bill *quia timet*, or to remove a cloud from the plaintiff's title. As the plaintiff already has what he seeks to recover, he has no standing in court to maintain this suit.

Under this view the judgment must be reversed, and the petition dismissed without prejudice. The other Judges concur.

JAMES F. HARDIN, Plaintiff in Error, *vs.* WM. A. MCCANSE, *et al.*, Defendants in Error.

1. *Ejectment—Matters dehors the record not to be inquired into.*—Matters not appearing on the face of the record cannot be inquired into collaterally in suit of ejectment.
2. *Execution—Death of one defendant in—Issue of against survivor, effect of.*—In ejectment brought by the purchaser at execution sale, his title would not under the Statutes of 1855, (p. 741, § 20 and p. 905, § 18,) be defeated by the fact that one of the parties, against whom the execution issued, had died between the date of the judgment and that of the execution, where it appeared that the property levied on and sold was that of the survivor. Under that statute the execution although irregular would not be void.

Error to Greene Circuit Court.

J. P. Ellis and J. F. Hardin, for Plaintiff in Error.

I. The several executions issued against Brown and Thomas in favor of Lacy, after the death of Brown, were void, and the purchaser under them took no title. (See, § 20, p. 741, R. C., 1855; 4 How., 58, leading cases in part; 6 Ala., 657; 4 Ala., 735; 19 Mo., 650; 16 Mass., 190; 4 Wall., 237, in point; 2 McLean, C. C., 59; 4 Iredell L. R., p. 377; Woodcock vs Bennett, 1 Cow., 738.)

McAfee & Phelps, for Defendants in Error.

I. The execution was not void. (Johnson vs. Lynch, 3 Bibb., 334; 6 Blackf., (Ind.) 93; Bowdoin vs. Jordan, 9 Mass., 154; 2 Saund. (Eng.) p. 72; 2 Tidd's Pr., 1009; Shelton vs. Hamilton, 23 Miss., 496; Hodge vs. Mitchell, 27 Miss., 560; Coleman vs. McAnulty, 16 Mo., 173; Warder vs. Tainter, 4 Watt., 270; Day vs. Sharp, 4 Whart., 339; Douglas vs. Marsie, 16 Ohio, 271.)

II. In the case of Woodcock vs. Bennett, 1 Cow., p. 738, the only case cited by appellant, in which there was a living defendant and also a dead one; unlike the one here, the dead man's property was also sold. And further, it will be observed, that the validity of the sale under that execution was not the question upon which the case was determined. The point was never raised in the court below, or by counsel in the case in any of the courts.

VORIES, Judge, delivered the opinion of the court.

This was an action of ejectment brought in the Circuit Court of Lawrence county by Robert Kimmons against McCanse and Paris, for the recovery of certain lands in the petition named, situate in said county. The venue of said cause was afterwards changed, by the agreement of the parties, to the Circuit Court for Greene county. After the commencement of the suit, James F. Hardin was substituted for Kimmons as party plaintiff upon his own motion.

The answer of the defendants denies all right in the plaintiff, in or to the east half of lot six of the northwest fractional quarter of section three, and the west half of lot six of the northeast fractional quarter of section three, southeast quarter of the southeast quarter of section eleven, or the north half of northeast quarter of section fourteen, all in township 29 of range 26, as described and charged in plaintiff's petition. As to the remainder of the land in the petition, defendants wholly disclaim any right or claim thereto, or that they have ever had any possession thereof, and deny the other allegations of the petition. Both parties claimed title to the lands in controversy by title derived from and through one Andrew W. Thomas; the plaintiff, by deed from said Thomas to Robert Kimmons, dated May 7th, 1861, and a deed from said Kimmons to himself, dated November 9th, 1867.

The defendant claimed title to part of the land in controversy, as set forth in his answer, by virtue of a deed from one Henry Childress, as Sheriff of Lawrence county, conveying said lands to defendants, dated November 12th, 1863, which said deed recited a judgment rendered by the Circuit Court of Lawrence county, in favor of Benjamin F. Lacy, as plaintiff, and against Alexander Brown and Andrew W. Thomas, rendered on the 13th day of November, 1860, the issue of an execution on said judgment, on the second day of October, 1863, directed to the Sheriff of said county, and a levy and sale of the same as the property of said Thomas, and to the other part or balance of the land named in his answer, by

virtue of a deed from said Sheriff, dated November 26th, 1866, reciting the same judgment, the issue of an execution thereon, on the 13th day of April, 1864, the levy of the same on the residue of said land as the property of said Brown and Thomas, and the advertisement and sale thereof to the defendants. The plaintiff objected to the reading of these deeds in evidence on the trial, because first, the judgment recited in said deeds and on which the executions were issued and the sales of the land made, were void, for the reason that no sufficient service of notice or summons was ever made on either of the defendants therein. Second, because Alexander Brown, one of the defendants in said judgment, was dead before either of said executions were issued, and said executions were issued against both of the defendants; for which reasons the sale and all proceedings under them were void, and the deeds therefore could pass no title to defendants. Third, because one of the defendants (Andrew W. Thomas) was in the State of Texas before either of said executions were issued, or said sales and deeds were made, namely, from February, 1862, to February, 1867, and within a disloyal district, and therefore said executions were void. Upon the hearing of these several objections to the admissibility of said Sheriff's deeds in evidence, the following facts were admitted to exist by the parties:

"That Andrew W. Thomas lived in Missouri until February, 1862: that he then went into the State of Texas, and into a portion of said State which was disloyal to the government of the United States; that he remained in said State, and in said section of said State, until February, 1867; that said portion of said State of Texas, was not, after February, 1862, occupied, held or controlled at any time by the military or naval forces of the United States, until May, 1865; that said Thomas had a wife and family when he went to Texas, and that they remained and resided in the State of Missouri during his whole residence in Texas, and until he returned. It was further agreed by the parties, that Alexander Brown, against whom, with A. W. Thomas, certain judg-

ments were rendered in the Lawrence Circuit Court, and under which judgments the defendants claim title to the land in controversy, died in the State of Texas, on the 13th day of January, 1863.

The entire record of the judgment and proceedings in the case of Lacy vs. Brown and Thomas was then read in evidence to support the objections of plaintiff to the service of a summons on defendants Brown and Thomas in said cause.

The court, after hearing all of the evidence in support of the objections urged to the receiving of said Sheriff's deeds in evidence, overruled said objections, and admitted said deeds in evidence. To which ruling of the court the plaintiff excepted. After this the plaintiff suffered a non-suit, with leave of the court to move to set the same aside, and afterwards filed his motion to set aside said non-suit, assigning as reasons therefor:

First—Because the court erred in admitting in evidence the said deeds given in evidence by the defendants.

Second—Because the court erred in overruling the objection made by plaintiff to the introduction of the deeds offered by the defendants.

This motion being overruled by the court, the plaintiff again excepted, and has brought the case to this court by writ of error.

It is objected by the plaintiff in error in this case to the reading of the deeds of the Sheriff in evidence, that it appears from the record in the said case of Lacy vs. Brown and Thomas, that no sufficient service was made of the summons in the case to give jurisdiction to the court over the parties defendant, and that the proceedings and judgment are therefore void. The service, as the same appears by the Sheriff's return, is as follows:

"Executed the within summons by leaving a copy of the petition and writ at the usual place of abode of the within Alexander Brown, with a white person of his family over the age of fifteen years, he being the first one served, and on the defendant, Andrew Thomas, by delivering to the said Andrew

Thomas a copy of the writ of summons. All done in Lawrence county, Missouri, on the 17th day of April, 1860."

This return is not only in substantial conformity to, but it is an exact compliance with, the Statutes of 1855 (which was in force at the time) in reference to the service of process of summons in this State. (Statutes of 1855, p. 1223, § 7.) The objection to the deeds, on the ground of the insufficiency of the service of the summons, was therefore properly overruled. It was next objected to the admissibility of said deeds in evidence, on the ground that Andrew W. Thomas, one of the defendants in the case of Lacy vs. Thomas and Brown, after the rendition of the judgment against him, left his home in the State of Missouri, before the issue of the executions under which the land was sold, and went into the State of Texas, in a portion thereof, which was disloyal to the United States government, and not under the control of any part of the authorities of the United States, where he remained until after the sale of the land in controversy under said executions.

It is difficult to see how the mere fact that Thomas voluntarily left the State, after a judgment had been rendered against him, and that he went into Territory, occupied by the confederate forces, could of itself paralyze the arm of the law in this State, and destroy the jurisdiction of the courts and the laws over his property situated here; but be that as it may, it has been decided, by a late case in this court, that such matters can not be inquired into in a collateral way upon a trial of an action upon ejectment. (Groner vs. Smith, 49 Mo., 318.) It follows that the second ground of objection made to said deeds was also properly overruled by the Circuit Court. The only remaining ground of objection, insisted on to the admissibility of said deeds, is, that one of the defendants in the judgments and executions, upon which the sheriff sold the land in controversy, was dead at the time of, and before the issuing of, said executions; and yet the executions were issued against both defendants, which, it is insisted, is prohibited by the statutes of the State, and consequently the executions as

well as the levy thereon, and the sale of the land in controversy, and the sheriff's deeds therefor, are all absolutely void, and confer no title to the land on the purchasers.

It is provided by the statutes of this State which were in force at the time of the issuing of the executions under consideration, as follows: "No execution shall issue upon any judgment or decree, rendered against the testator in his lifetime, or against his executors or administrators after his death, which judgment or decree constitutes a demand against the estate of any testator or intestate within the meaning of an act entitled, "An Act respecting executors and administrators;" but all such demands shall be classed and proceeded on, in the County Court, as required by said act." (Revised Statutes, 1855, p. 741, § 20.)

It is also provided by the statutes concerning judgments, that "When there are several defendants in a judgment or decree, and some of them die before the same is satisfied, or carried into effect, the judgment or decree, if concerning real estate, shall survive against his or their heirs or devisees, and execution may issue against any surviving defendant or defendants; or such judgment or decree may be revived against the heirs or devisees of any or all such deceased defendants by *scire facias*, and execution may be sued out against the surviving defendant or defendants, and the heirs or devisees of such deceased defendants, or such of them as are made parties jointly; but if such judgment or decree concern the personalty, execution shall be sued out only against the surviving defendant or defendants; and if the lien of the judgment or decree has not expired, it shall be exhibited in the County Court for allowance, as other demands against the deceased defendant or defendants' estate; but if the lien has expired, the judgment or decree shall be revived against the executors or administrators of the deceased defendant or defendants, and then shall be proceeded with as hereinbefore directed." (Revised Statutes, 1855, p. 905, § 18.)

The two sections of the statute above quoted evidently had two principle objects in view: first, to wholly prevent the

issuing of an execution against a deceased person, after his death, and to compel all debts against deceased persons to be settled in the County Court, where they could be classed, and paid in conformity to the laws in such cases provided; and secondly, to provide a mode by which a plaintiff who had a judgment only concerning the personalty against several defendants, some of whom were dead, might have execution, and collect the amount of his judgment from the survivor or survivors. If the judgment was against only one defendant, and he died before execution issued, none could be issued against his property. (Miller vs. Doan, 19 Mo., 650.) But if the judgment was against several defendants, and one of them died, then the plaintiff could have an execution against the survivors only. In the case under consideration, the judgment was against Brown and Thomas. After the rendition of the judgment, and before any execution issued on it, Brown died. An execution was then issued against both of the defendants, but was only levied on the property of Thomas, who was living, and his property was sold and a sheriff's deed executed therefor. The question presented is, was the execution and sale by the sheriff, wholly void? By the rule of the common law, where there was only one defendant in a judgment, and he died, an execution issued on the judgment against such deceased defendant was wholly void; the parties in interest being changed, the process must also be changed. (Mitchell vs. Maxent, 4 Wall., 237; Erwin vs. Dundas, 4 How., 58.) In the last named case, the learned judge, who delivers the opinion of the court, uses this language:

"At common law, a judgment or recognizance in the nature of a judgment did not bind the lands of the defendant, nor did the execution disturb the possession, as it went only against the goods and chattels. The statute of Westm., 2 Ch. 18, (13 Ed. 1,) first subjected the lands of the debtor to execution on a judgment recovered against him, and gave the plaintiff the writ of *elegit*, by virtue of which the sheriff seized and delivered a moiety of the lands, until the debt was levied out of the rents and profits. Under this statute, a

moiety of the land is deemed bound from the rendition of the judgment. * * * Before the statute, a judgment was considered a charge only upon the personal estate of the defendant; since, a charge upon both the real and personal estate.

"Before and since the statute, in case of a judgment against two defendants, and the death of one, the charge of the judgment survived against the personal estate of the survivor; and execution could be taken out against him within the year without a *scire facias*, and the debt levied.* * * The writ, however, must be in form against both to correspond with the record; but it could be executed against the goods of the survivor only, or on making a suggestion of the death upon the record, the writ could be against the survivor alone. * * *

"It will be seen, therefore, from these authorities, that the same objections exist both in principle and in reason, as it respects the enforcement of a judgment against two, by a sale of the real estate on execution at the death of one, which have been shown to exist against the enforcement of a judgment against a single defendant after his death. For, as the charge of the judgment against the land does not survive, but continues upon the land of both after the death of one, the same as before, and cannot be enforced against the real estate of the survivor alone, as in the case of personalty, and the execution must therefore be issued against both, if issued at all, it is obvious the lands of the deceased in that event, are as liable to be sold by the sheriff, as the lands of the survivor."

Now it will be seen, that the very reasons given in the opinion above referred to, why an execution cannot issue against the survivor, and his land be sold in such case, have been obviated by our statute. The statute expressly provides that "an execution may be issued against the survivor in such case, and his land sold, and it may be further observed, that land and chattels are both subjected to sale by our laws, in the same way upon execution, and if there was no statute to the contrary, it would be proper under our laws, where the whole title to the land is sold upon execution just

as the whole title to personalty is sold, to issue the execution against both defendants, after the death of one, so as to make the writ conform to the record, and levy and sell the property of the survivor just as personalty was sold in such cases at common law; but our statute provides, that "the execution shall issue against the survivor only, and doubtless it is ir regular to issue the writ against both; but as the execution was only levied upon the property of the surviving defendant, and only his property sold, the question is, has not the law been substantially complied with?

In the case of (Woodcock vs. Bennett, 1 Cow., 711,) the execution was against both the deceased defendant and the survivor, and the property levied on was levied on and sold as the property of both; the writ in that case was held to be void. But no reference is made to any statute, by which executions may be issued against surviving defendants, such as we have here. In the case of Carnahan vs. Brown, 6 Blackf. 93, Carnahan recovered judgment in a personal action against one Ward; Brown entered himself as bail to stay the execution; By the laws of Indiana, after Brown entered himself as bail for Ward, he was considered and treated as a joint defendant in the judgment, and execution issued against both, after the expiration of the time for which the judgment was stayed. Before an execution was issued on the judgment, Ward died. Carnahan, after the death of Ward, sued out execution against both defendants. Brown filed a motion to quash the execution. The Circuit Court sustained the motion, and quashed the execution. The case was appealed to the Supreme Court, where Dewy, Judge, in delivering the opinion of the court uses this language: "We think there was no good reason for setting aside the execution. By virtue of the replevin, Brown became a joint debtor with Ward in the judgment. Judgments in personal actions where there are several plaintiffs or defendants, one of whom may have died after judgment rendered, may be enforced by or against the survivors without a *scire facias;* but the writ of execution in such cases, in order to conform to the judgment, must be sued out in the joint names of all the plaintiffs or defendants."

The judgment was reversed and the execution held good. (See also, Bowdoin vs. Jordan, 9 Mass. 154; Johnston vs. Lynch, 3 Bibb. 334; 23 Miss. 496; 27 *Id.*, 560; Coleman vs. McAnulty, 16 Mo. 173, Warden vs. Tainter, 4 Watts. 278.)

It appears from the above cases, that where real and personal property can be sold under an execution, and the whole title to each pass by the sheriff's sale, that an execution may be issued against the survivor of two joint defendants, after the death of his co-defendant, but can only be served upon or executed against the property of the survivor, just as an execution could be issued at common law against the personalty. Our statute, however, directs that the execution shall only be issued against the survivor, but the execution in the present case having been levied only upon the property of the survivor, and his property only sold, the mistake of the clerk, in issuing the execution against both defendants, is only an irregularity; the execution was not void. To hold an execution void in such a case, would partake more of the enforcement of technical refinements than the administration of justice.

With the concurrence of the other judges, the judgment of the Greene Circuit Court is affirmed. Judge Sherwood did not sit.

SAMUEL J. BRACKETT, Appellant, *vs.* JAMES L. BRACKETT, Respondent.

1. *Judgment—Irregularity in—Execution—Motion to quash.*—Where a court has power to render judgment, any mere irregularity in the proceedings may be reached by appeal, or direct proceedings to vacate the judgment, but not by a motion to quash the execution.
2. *Attachment—Plea in abatement—Trial on the merits.*—In suit began by attachment, verdict for defendant on the plea in abatement, does not deprive the court of its jurisdiction to proceed with the case upon the merits, (W. S., 189, § 42,) where defendant is a resident of the county, and in the absence of evidence to the contrary, such fact will be presumed in favor of the judgment.

Appeal from Pettis Court of Common Pleas.

McDonald & Houston, for Appellant.

I. The filing of a plea in abatement was an entry of appearance in the cause, and authorized a general judgment, if either party resided in Pettis county. (Evans vs. King, 7 Mo., 411.) And there being no evidence to the contrary, it will be presumed in favor of the judgment, that appellant did reside in Pettis county. Hence the rule laid down in Peery vs. Harper, (42 Mo., 131,) does not apply to this case.

II. The objections to the judgment could have been corrected by appeal or writ of error, and the defendant, having failed to avail himself of this remedy, has now no remedy. (Marsh vs. Bast, 41 Mo., 493; Collins vs. Bannister, 48 Mo., 435; Finney vs. State, 9 Mo., 632.)

Snoddy & Bridges, for Respondent.

I. Under the statute, (W. S., 189–90, § 42,) upon the dissolution of the attachment, the suit stood as though originally instituted by summons alone. And respondent, as the summons showed, neither resided in Pettis county, nor was found in said county. Hence the court had no jurisdiction. (Peery vs. Harper, 42 Mo., 131; Latimer vs. Union Pac. Railway, E. D., 43 Mo., 105.)

II. The motion to quash the execution was the proper remedy, and no notice was required, as the real estate levied on

was to be sold on the first day of the term. (Parker vs. Han. & St. Joe R. R. Co., 44 Mo., 415.)

III. When proceedings are clearly irregular and void, the courts will quash them. (3 Bouv. Inst. n. 3342.)

WAGNER, Judge, delivered the opinion of the court.

The exceptions in this cause arise on the action of the court in sustaining a motion to quash an execution.

From the exhibits, it appears that the plaintiff brought his suit by attachment, and the petition contained three counts; one founded upon a promissory note; one on an open account; and the other was a declaration for money loaned.

The defendant appeared and filed his plea in abatement, which was sustained by the court, and the attachment was dissolved. No answer being filed, the court at the same term rendered judgment in favor of the plaintiff for the amount of the note set out in the petition. Upon this judgment execution was sued out, and at the next or return term of the court, the defendant appeared and moved to quash the execution, because,

1st. The judgment rendered in the cause was a final judgment, rendered at the same term with the interlocutory judgment, and the same was on a petition founded on a note for the direct payment of money, and on an account not stated or itemized; and,

2nd. The court had no jurisdiction over the defendant in the cause, as the suit was instituted by attachment, and the plea in abatement was sustained by the court.

First. It is unnecessary to inquire whether the court committed any error in giving judgment on the note, without noticing the additional counts or causes of action set forth in the petition, or whether the judgment was entered up at the proper time.

If the court possessed jurisdiction, it had the undoubted power to enter final judgment, and any irregularity it committed would enable the party to reverse the judgment on error or appeal, or vacate the same by a direct proceeding, but it would surely not be competent to attack it collaterally.

Second. When the plea in abatement was found for the defendant, that did not deprive the court of jurisdiction to proceed with the case as an ordinary action.

By the statute, (1 W. S., 189, § 42,) it is provided, that if the issue upon the plea in abatement is found for the defendant, the attachment shall abate, and the plaintiff pay the costs accruing therein, but the suit shall nevertheless, proceed to final judgment, on the cause of action alleged in the petition, as though commenced by summons alone.

This section furnishes a full warrant for the proceeding of the court.

After the attachment was abated, then the case remained on the docket as an ordinary action commenced by summons.

Counsel have here argued, that the court had no jurisdiction, because neither of the parties were residents of the county where the suit was brought. But the record does not disclose that fact, and the presumption must be in favor of the judgment. If defendant has any remedy, he must pursue it in a different manner.

Wherefore the judgment must be reversed, and the cause remanded. All the Judges concur.

THE STATE OF MISSOURI, Respondent, *vs.* THOMAS SMITH, Appellant.

1. *Practice, criminal—Evidence—Insanity—Burden of proof.*—The question of insanity is simply one of fact and to be proved like any other fact. The evidence to establish it should reasonably satisfy the minds of the jury that the accused was insane when the act was committed.

   The burden of proving insanity is on the defendant.

2. *Evidence—Instructions as to particular facts.*—It is not the province of the Court to select certain facts shown by the evidence and tell the jury how much or what or whether any weight shall be attached to them.

Appeal from Greene Circuit Court.

O. H. Tavers, for Appellant.

H. Clay Ewing, Attorney General, for Respondent.

VORIES, Judge, delivered the opinion of the court.

The appellant was prosecuted and tried in the Greene Circuit Court upon an indictment for an assault with the intent to kill. It is charged in substance, by the indictment, that the defendant on the 5th day of July, 1871, at the County of Greene, &c., did unlawfully, wilfully and feloniously, with a chopping axe, which was a deadly weapon, &c., make an assault upon the body of one Amanda Hancock, with the intent to kill, &c.

The evidence on the part of the State was circumstantial, no direct evidence of the assault by defendant being introduced. The defendant introduced several witnesses, whose evidence tended strongly to prove insanity on the part of the defendant.

This evidence tended to prove insanity at a time commencing four or five months before the assault, and only a few days previous to the assault, and after the assault while the defendant was in prison.

At the close of the evidence, the court, on the part of the State, instructed the jury as follows:

First—"The court instructs the jury, that the law presumes that every man that has arrived at years of discretion is sane, and that the presumption continues until the contrary is shown by the weight and preponderance of testimony."

Second—"The court declares the law to be, that when the State has proven the offense charged, she can rest her case upon the legal presumption that the party accused is of sound mind, and if the defendant seeks to avoid the punishment, he must satisfy the jury by the weight and preponderance of testimony that he was insane at the moment that he committed the crime."

Third—"That it is not sufficient to warrant an acquittal, for the defendant simply to show that at times he acted and talked strangely and singularly; but that the jury must believe from the testimony, that he was insane at the very time that he committed the offense, and that he was so insane that he could not distinguish right from wrong."

To the giving of these instructions the defendant objected, and his objections being overruled he excepted. The defendant then asked the court to give the jury several instructions, all of which were refused, and he again excepted.

Two of these instructions asked and refused, were as follows:

"The court instructs the jury that it devolves upon the State to prove that the defendant is guilty, as charged by the indictment, and unless the State has established beyond all reasonable doubt, that the defendant is guilty, as charged, they will acquit."

"That if upon a review of the whole case, and a consideration of all the circumstances connected with it, the jury have a reasonable doubt as to the guilt of the defendant, they will find him not guilty."

After the above instructions were refused, the defendant asked the court to instruct the jury, that, "If they have a reasonable doubt as to the guilt of the defendant, they will acquit." This was also refused and the defendant again excepted.

The jury then returned a verdict of guilty against the defendant, and assessed his punishment at imprisonment in the penitentiary for the term of two years.

The defendant filed a motion for a new trial on the ground, among others, that the court had erred in refusing proper instructions asked for by the defendant, and in giving improper instructions on the part of the State.

This motion was overruled, and final judgment rendered against the defendant. The defendant again excepted and appealed to this court.

The only questions presented by the record for the consideration of this court, are, as to the propriety or impropriety of the action of the court trying the cause, in giving instructions on the part of the State and in refusing those asked for by the defendant.

By the first and second instructions given by the court on the part of the prosecution, the jury are told, that the law

presumes that every man who has arrived at years of discretion is sane or of sound mind; and that if the defendant seeks to avoid this presumption, he must satisfy the jury by the weight and preponderance of testimony, that he was insane at the time he committed the crime.

It is urged by the defendant that the court committed error in these instructions. The authorities upon the subject of insanity, and upon the subject of the burden and amount of proof in such cases, will be found to be very conflicting; some courts holding, that it devolves on the defendant in such cases to prove the fact of insanity by evidence so clear, as to leave no reasonable doubt as to the insanity. Other courts have held, that all that is necessary is to produce enough evidence to create a reasonable doubt in the minds of the jurors as to whether insanity exists in the given case or not; while it has been repeatedly held in this court, that "insanity is a simple question of fact to be proved like any other fact, and any evidence, which reasonably satisfies the jury that the accused was insane at the time the act was committed, should be deemed sufficient." (State vs. Hundley, 46 Mo., 414; State vs. Klinger, 43 Mo., 127; State vs. McCoy, 34 Mo., 531.)

The burden of proof of course is held by this court to be on the defendant to rebut the presumption of sanity which exists in all cases until the contrary is made to appear.

The instructions under consideration would have been more satisfactory if they had been differently worded, though the principle asserted in them is in effect the same as that enunciated in the cases decided by this court above referred to.

The jury are told that they must be satisfied by the weight and preponderance of testimony.

This language is well understood by lawyers to mean, that the evidence must be sufficient to satisfy the minds of the jurors as to the fact of insanity, and that is all that is required. (Of course this must necessarily be accomplished by a preponderance of the evidence.) But the jury are told by

the instructions that this conviction of their minds must be produced by the "weight and preponderance of the testimony."

It is barely possible, that jurors might be led to believe that it took something more than a conviction of the mind to find in favor of a plea of insanity, from the language used in the instructions. Yet, instructions using almost the same language have been approved in the cases above referred to. The case would therefore not be reversed merely on the ground of the informality of these instructions.

The third instruction, given by the court on the part of the prosecution, tells the jury, "that it is not sufficient to warrant an acquittal, for the defendant simply to show that at times he acted and talked strangely and singularly, but that the jury must believe from the testimony that he was insane at the very time he committed the offense, and that he was so insane that he could not distinguish right from wrong."

This instruction was clearly wrong; it is not the province of the court to select certain facts shown by the evidence, and tell the jury how much and what weight they shall give to such facts, or whether they shall give such evidence any weight at all.

The court passes upon the legality or admissibility of the evidence, but after the evidence is legally admitted, it is the exclusive provision of the jury to pass upon the weight of the evidence given, and give each part of the evidence such weight as in their judgment it is entitled to receive, without any interference or direction of the court whatever.

Their minds ought to act freely on the facts of the case without any other control than that of their own unbiased judgment.

This instruction is a comment on the evidence, which is expressly forbidden by our Statute. (W. S., 1106, § 30.)

The Statute provides, that the court shall not "sum up or comment on the evidence." If the court can, under this Statute, select certain portions of the evidence and tell the jury how much weight to give, or whether they shall give

the evidence selected any weight at all; then no reason can be perceived why the court could not select other parts of the evidence, or all of the facts in the case, and tell the jury what weight to give the same, and in effect tell what verdict should be found.

To permit this, would be to wholly destroy whatever value there is in the right of trial by jury.

The decisions of this court have been uniformly in condemnation of such instructions. (State vs. Hundley, 46 Mo., 414; Fine. vs. St. Louis Public Schools, 30 Mo., 166; State vs. Cushing, 29 Mo., 215.)

The defendant in the trial asked the court to instruct the jury:

"That if upon a review of the whole case and a consideration of all the circumstances connected with it, the jury have a reasonable doubt as to the guilt of the defendant, they will find him not guilty."

The court was clearly wrong in refusing to give this instruction. In this case the assault charged in the indictment was not admitted so as to leave the issue of insanity or no insanity the only issue to be tried.

The assault was denied, and was only attempted to be proved by circumstantial evidence, so that the jury had to pass upon not only the fact of insanity, but also on the evidence tending to prove that the accused committed the assault complained of.

In such case the instruction asked was clearly right and ought to have been given.

In delivering the opinion of the court in the case above referred to, of The State of Missouri vs. Klinger, Judge Wagner approvingly makes the following quotation from Bishop on Criminal Law:

"Sanity, as observed by a learned judge, is presumed to be the normal state of the human mind, and it is never incumbent on a prosecutor to give affirmative evidence that such state exists in a particular case.

"But suppose this normal state is denied to have existed in

the particular instance, then if evidence is produced in support of such denial, the jury must judge of it and its effect on the main issue of guilty or not guilty, and if, considering all the evidence, and considering the presumption, that what a man does is sanely done, and suffering the evidence and the presumption to work together in their minds, they entertain a reasonable doubt whether the prisoner did the act in a sane state of mind, they are to acquit. Otherwise they are to convict."

I am of the opinion that the judgment should be reversed. The other judges concurring, the judgment is reversed and the cause remanded.

———o———

JACOB B. SMITH, Appellant, *vs.* WILLIAM SHORE, Respondent.

1. *Justices' Courts—Appeal—Lafayette County.*—Nothing in the acts relating to Lafayette Court of Common Pleas requires, that an appeal from a justice of that county should be taken to that court instead of the Lafayette Circuit Court, when the term of the former began soonest after the date of granting the appeal.

Appeal from Lafayette Circuit Court.

Rathbun & Graves, for Apellant.

SHERWOOD, Judge, delivered the opinion of the court.

This was an action brought by Smith against Shore before a Justice of the Peace of Lafayette County. A trial was had resulting in a judgment in favor of the defendant, from which the plaintiff appealed to the Circuit Court of that county, and on motion of the defendant that court dismissed the appeal on the ground, that as the appeal was taken ten days before the first day of the term of the Common Pleas Court of that county, it should have gone to that court, and therefore that the Circuit Court had no jurisdiction.

Although there are in the acts, creating some of the Common Pleas Courts of this State, provisions requiring appeals

from magistrates to be brought to that court (either Common Pleas or Circuit Court,) whose term should occur next after the appeal taken, yet an examination of all the Acts, both original or amendatory, in relation to the Lafayette Court of Common Pleas, does not disclose any requirement of this character, nor is there anything in the general law on the subject of appeals from Justices of the Peace, which will uphold the ruling made on defendant's motion in the court below.

For these reasons the judgment will be reversed and the cause remanded. Judge Adams absent, the other judges concur

———o———

GRANVILLE SMITH, *et al.*, Respondents, *vs.* ELI G. PARIS, *et al.*, Appellants.

1. *Administrator—Note given by, under mistake as to amount of assets.*—Certain unauthorized executions had been issued from the Probate Court on behalf of the creditors of an estate, against the individual property of an administrator, for sums claimed to be due them by him as administrator. Under the pressure of threatened levy, and under a mutual misapprehension as to the extent and value of the assets in his hands, the administrator gave his individual notes for specified sums, payable partly in cash, and partly on time. No abatement in the amount of the claims was made, and no compromise effected further than the granting of an extension of time. In consideration of the notes, the creditors surrendered and receipted for their claims. It afterward transpired that the amount of assets in his hands had been miscalculated and overestimated in the Probate Court, and the amount charged against him, was reduced accordingly by order of court. Suit having been brought against him upon the notes, *Held*, that the administrator might properly show in defense, that the notes were given under a mistaken impression of the extent of means in his hands; and, that in point of fact, there were no trust assets to which plaintiff had a right to look for payment. And *semble*, that defendant might have no claim to the interposition of equity, because of his own negligence, except for the fact that the levies on his own property placed him under duress.

The above case is not one hinging on a compromise of contested claims between parties, where the law or the facts are uncertain.

Appeal from Greene Circuit Court.

N. Bray, for Appellants.

I. Parties making a mistake in matters of fact are not held bound by acts committed by them under such mistake. (Marshall vs. Collett, 1 Y. & C. 238; Groves vs. Perkins, 6 Sim., 576; Currie vs. Steele, 2 Sandford, S. C., 542; Turner vs. Turner, 2 Ch. R., 81; Bingham vs. Bingham, 1 Ves., 127; Gee vs. Spenser, 1 Verm., 32; 1 Sto. Eq., 8 Ed., § 138, and note 1; §§ 138, 140, *Ibid*, 141; *Id.* 147.)

J. P. Ellis, for Respondents.

I. The compromise of a doubtful claim, or the relinquishment of a pending suit or proceeding, is a good consideration for a promise. (Stoddard vs. Mix, 14 Conn., 12; Paris vs. Dexter, 15 Verm. 379.) And even though there was no foundation for the proceeding, and no cause of action. (Morey vs. Town of Newfane, 8 Barb., 653; Russell vs. Cook, 3 Hill, 504; Stewart vs. Ahrenfeldt, 4 Denio, 189; O'Keson vs. Barclay, 2 Penn., 531; Holcomb vs. Stimpson, 8 Verm., 141; Stephens vs. Spiers, 25 Mo., 386; 1 Sto. Eq. Jur., § 131.)

II. A court of equity will not relieve a party from the consequences of a mistake of fact, if by reasonable diligence he could have obtained knowledge of the fact. Equity will not encourage culpable negligence. (1 Sto. Eq. Jur., §§ 146, 150; Weed vs. Terry, 2 Dougl. (Mich.,) 349.)

III. In order to relieve against a mistake of fact, the court must be in such a situation, as to be able to place the parties in *statu quo*. (1 Sto. Eq. Jur., (Redf. Ed.,) § 138) This cannot be done in this case; plaintiffs are no longer creditors of the estate of Young; that estate holds their receipt in full.

Napton, Judge, delivered the opinion of the court.

This suit was on a note. The answer admitted the execution of the note, but set up as a defense, that it was made by defendant under ignorance of facts; that he was administrator of the estate of one Young, and he supposed that there were assets sufficient to pay all demands in the fifth class, but that he was mistaken in this; that the amount of assets, charged

against him as administrator, was not correct, and the amount credited as paid out by him was not correct; that he has ascertained since the said note was given, that the order of the court for distribution among creditors was erroneous, and that it has been corrected in said court; that he has already paid plaintiffs all they would be entitled to upon a correction of the mistake; and therefore there was no consideration for the note sued on.

The replication denies that the note was given upon a mistake of facts, or that the consideration of the note was as stated in the plea, and avers that the plaintiffs had a claim against the estate of Young, amounting to $6,994.71; that the defendant was administrator, and the court having probate jurisdiction ordered the payment of said claim; that they afterwards caused an execution to be issued on this order against the goods and chattels, lands and tenements of said Paris, and when said property was about to be sold under said execution, the said Paris offered to compromise; and to effect this, offered to execute his note with security for the amount specified, payable in twelve months, if the plaintiffs would accept the same in payment of their claim against said estate of Young, and release his (Paris') property, which was accepted; and the note sued on was then and there made, and the plaintiffs did stop the execution against said Paris' property, and the same was not sold, and they delivered up to defendant Paris their claims against said Young's estate, and receipted for them; and that said Paris, defendant, afterwards used said receipts as vouchers in his settlement.

The petition denies all knowledge concerning subsequent settlements of said Paris with the court of probate, and avers that this note estopped Paris from setting up any alleged errors.

There was a motion to strike out this replication, or the most of it, which was overruled.

At the trial, the defendant offered to proceed with his defense, and introduce testimony to show mistake and want of consideration, but the court did not allow this, and the plain-

tiffs were first allowed to establish by proof the facts asserted in their replication.

The evidence shows, that the defendant, Paris, had a consultation with the lawyers of the various claimants against Young's estate, who had issued executions against him, which were levied on his real and personal estate, and proposed to them to pay off a certain proportion of their demands in money, and give his notes for the remainder, with 10 per cent. interest, on twelve months' time, and giving security, upon condition that the claimants would give up their demands, which he could use as vouchers in his settlement with the court. This proposal of Paris was accepted. The demands were given up and receipted in full, and notes were given by Paris, and the note sued on is one of them. The executions were stopped.

The defendant then offered certain records of the Probate Court. The following is the entry on 21st Feb., 1871: "Now at this day, it appearing to the court that Eli G. Paris, administrator of estate of J. Young, stands charged in the books for the record of Inventories, with an aggregate amount of $18,226.03, when he should be charged with only the sum of $15,397.98, and it also appearing, that a similar error has occurred in the ledger and in record "B," p. 1, of this court, in filing said Inventory, and it further appearing, that said administrator is charged in said ledger with $1,822.60 interest, and with $2,950.00 for sale of land to John Holland, and the further sum of $1,000 for land sold to John Holland, and with $1,093.00 for land sold to W. B. Edwards. It is therefore ordered by the court, that the clerk of this court add up said Inventory, and correct the records in all particulars, so as to conform to said Inventory, and that he strike the item of $1,822.60, on said Ledger as interest, off said records, as also the charges of $2,950.00, and $1,000.00 for lands sold to John Holland, and that the amount charged as land sold to W. B. Edwards be changed to read $1,066.66, so that the whole may be made to conform to the original Inventory and sale bills made by said administrator."

This record was offered to show a mistake of $3,197.00 against Paris, that as originally added up it made $18.385.00, when it should have been $15,188.00; this evidence was objected to and excluded.

There were various other proceedings in the Probate Court offered as evidence, but ruled irrelevant. These records showed, that the demands in the 5th class amounted to $23.015,00. The defendant then offered in evidence the order of the Probate Court, allowing an appeal from the order of said court, ordering him to pay all claims in the 5th class. The order was as follows: "In the matter of the estate of John Young, deceased, for good cause shown, it is ordered by the court, that Eli G. Paris, administrator, etc., be allowed to file his affidavit and bond for an appeal and bill of exceptions in vacation from the decision of this court overruling the motion of said administrator to set aside order for the payment of the whole of the demands in the 5th class of demands."

This was excluded. There was also offered a motion to set aside the order to pay debts in the 5th class, and to quash executions on them,which was overruled in the Probate Court. The defendant then offered in evidence the order of the Probate Court, granting an appeal from their order to pay debts in the 5th class; which order is as follows:

"Now at this day comes said administrator, and files here his affidavit for an appeal to the Circuit Court from an order of this court to pay the debts in the 5th class,which appeal is by the court granted." This evidence was excluded as irrelevant. The following entries were also offered: "Now at this day comes said administrator, and by leave of the court files his motion to quash execution issued against him, and to set aside the order for the payment of debts in the 5th class." This order is as follows: "Aug. 21, 1865, ordered that the administrator of the estate of John Young, deceased, pay all demands against said estate in the 5th class."

The motion to set aside order, and to quash execution, was overruled. This appeal seems, from the testimony of the clerk of the Circuit Court, not to have been disposed of.

The defendant then offered Paris as a witness, who said it was part of the agreement he made, that the suit of Headly should be dismissed, and offered to prove by him, that his attornies informed him, that there were sufficient assets in his hands, at the time of the execution of said note sued on, to pay off all demands in 5th class; that he was not aware of the mistake in computation of the inventory, nor that he had been charged with sales of lands, which had been disallowed by the court, and that he executed the notes under a mistake of fact, believing there were sufficient assets in his hands to pay the 5th class claims; that he would not have executed the notes, if he had known of the errors in the Inventory and the settlements, and in the amount charged against him for sale of lands. This evidence was excluded.

The defendant asked the following declaration of law: "That where notes are given for an antecedent demand, which had been allowed in the Probate Court against the administrator, the maker of the note, and such note is given for the amount of the demand and interest; this is the real consideration of the note; and the fact that defendant Paris' land had been levied on, by virtue of an execution from the Probate Court, and said note was executed for the original demand allowed against him as administrator, and that at the time of executing it, there was an agreement between Paris, administrator, and plaintiffs, that they would stop executions, etc., does not alter the consideration of said note."

There were various other instructions in relation to the Headly claim, which seem not to be important, as that claim or suit was really dismissed.

There were declarations of law also offered in regard to the issue of executions without a demand on the administrator, but there was no evidence to support them, and they were properly refused for this reason. There were the usual motions for new trial and in arrest, and exceptions were taken to every decision of the court.

Without expressing any opinion as to the order of introducing evidence in this case, it is plain that the merits of the

case depended upon the theory adopted by the court on the trial, and which was carried out to the end, that a mistake of fact was no defense to a note, if the fact was one which the defendant ought to have known more about than the plaintiff, or one of which both the parties were equally ignorant. There was undoubtedly a degree of negligence in the conduct of defendant which seems difficult to account for. He was a mere trustee, and had been ordered by the court to pay certain claims in that capacity. He appealed from the order, and this appeal would appear to indicate, that at that date he was not satisfied that the liability imposed on him was just, yet afterwards, and when executions were out against him, which were clearly illegal, he proposes to pay a certain amount on the claims, and give his notes with security for the remainder due. This, he says,was done by him without any knowledge, that in his settlement the accounts were wrongly calculated, and that mistakes had been made against him, showing the assets of the estate greater by several thousand dollars than they really were. To prove this, he offers the records of the Probate Court, from which it appears, that such mistakes were committed and subsequently corrected in that court. These records were all rejected, on the theory, that they were irrelevant, and that correcting the mistake it was still no defense, on the ground, I presume, that the mistake was one which the defendant ought to have known, he being administrator, and that it was gross negligence for him not to have informed himself.

On this state of facts it is not very clear, that the defendant was entitled to any relief in equity; but there is a feature of the transaction, which, to some extent, relieves him from this imputation of gross negligence. When his appeal from the order of the Probate Court was made, and his affidavit filed (no bond being required by law from an administrator), it operated as a *supersedeas*, and no executions should have been issued. In point of fact executions were issued and levied on the defendant's land, and though he attempted to have these executions quashed, he failed. The compromise was then proposed by him, and the note sued on was given.

Under these circumstances, the defendant is entitled to some leniency in examining his acts. The consideration for the notes was ample, if the executions had been valid. There was also a surrender of the claims against Young's estate.

But it is obvious, that the defendant was at a disadvantage, and was hardly in a condition to exercise his judgment, when he met the creditors of the estate. Sales under execution might carry the title, or at least subject him to troublesome and expensive litigation. That a fair compromise will be sustained by the courts, notwithstanding errors of law or mistake of facts, of which the party complaining could by reasonable diligence have informed himself, is no doubt the law of Equity Courts; but the application of the general doctrine to particular cases is not uniform, and a very slight change of circumstances may operate to change the equitable rights of parties.

It does not follow because a compromise is effected, that mistakes made by either party may not be corrected in compromises, as well as in other contracts, if they are such mistakes as form a basis of equitable relief. In this case the defendant was a trustee, acting for others; he was not responsible any further than the estate in his hands made him responsible. The compromise made by him was made in his capacity as trustee, though it ended in an assumption of individual responsibility, and although there was manifest negligence on his part in his reports and settlements with the Probate Court, and in not seeing to their correction in time, yet, if the note in suit voluntarily given as it was, was given under a mistaken impression of the extent of the means in his hands which he held merely in trust for others, it would be a harsh application of the law concerning negligence to compel its payment, especially when it could hardly be said that the defendant was free to act, being pressed by executions against his individual property illegally issued in favor of the plaintiffs and others.

It is said that no relief can be granted in this case, because the creditors of Young surrendered to defendant their claims

against the estate of Young, and receipted for them, and therefore parties cannot be placed in *statu quo*. But it is clear, that if the consideration of this surrender fails, the claims are not receipted.

The doctrine of Courts of Equity, in regard to compromises of contested claims, has no application in this case. There was no dispute about the validity of the plaintiff's claims; there was no dispute about the liability of Young's estate for their payment. There was no dispute or difference of opinion about the law or the facts so far as they were known to both parties at the time. The compromise offered by the defendant was in fact no compromise, so far as the validity of the claims and their amount was concerned. He simply agrees to pay them partly in cash and partly in notes. They were not claims against him, except in his capacity as administrator; but as they had been allowed, and an order of court had been made for their immediate payment, and executions had been issued on this order, though appealed from, the defendant's property was liable to be sold to pay them. He pays them partly in cash, and gives his notes for the remainder. The only compromise he effects is to get time. No abatement of amount of claims is made. The defendant agrees to pay them, supposing he had ample assets of the estate to do so, and he proposed to show that on this latter point he was mistaken, and that the mistake was owing to a miscalculation of his Inventory and sale accounts in the Probate Court, afterwards corrected. This case has nothing to do with compromises of contested claims between parties in which it is uncertain how the law is, or the facts are.

The Circuit Court in the trial of this case seems to have proceeded in all its rulings on the ground that the defendant had no right to the aid of the court's equitable power, because of his culpable negligence.

We are not disposed to say that this view was wrong, had it not been for the fact that defendant, when he made this note and others, was under a sort of duress, brought about by levies on his own property to pay trust claims.

This fact has a strong tendency to establish the absence of that fairness and equal footing, upon which parties should meet in the adjustment of conflicting claims, and may set off the negligence of defendant in not seeing to a correction of his settlements in the Probate Court.

We shall reverse the judgment and remand the case, with a view that the evidence on both sides may be heard.

Judges Wagner and Vories concur; Judges Adams and Sherwood did not sit.

———o———

EBENEZER CARVER and SAMANTHA CARVER, Respondents, *v s* BRYANT THORNHILL, Appellant.

1. *Practice, Supreme Court—Points not presented in motion for new trial, not examined afterward.*—Grounds of objection, not set forth in motion for new trial, will not be heard in the Supreme Court.
2. *Practice civil—Supreme Court—Evidence—Re-examination of.*—Where there is any evidence to sustain a verdict, the testimony will not be weighed by the Supreme Court.

Appeal from Johnson Court of Common Pleas.

Ashbury, Elliot & Blodgett, for Appellant.

N. H. Conklin, for Respondents.

VORIES, Judge, delivered the opinion of the court.

This action was brought to recover damages for an alleged breach of a covenant against incumbrances, contained in a deed executed by the defendant.

The petition charged, that the defendant by his deed sealed with his seal, dated the 20th day of November, 1861, (which was filed with the petition,) conveyed to the said Samantha Carver, wife of Ebenezer Carver, for the consideration of eighteen hundred dollars, a certain tract of land described as being in Knox County, Ohio; that by said deed the defendant covenanted with the said Samantha Carver, that he was well seized of the premises, and had good right to sell and

convey the same, and further, that said premises were free of all incumbrances whatsoever, and with general covenants of warranty. The breach assigned of the covenants of the deed was, that at the date of the deed there was existing a deed of mortgage, given by the defendant on the 28th day of March, 1860, to one William C. Hall, wherein said premises were conveyed to said Hall to secure the payment of a promissory note, given by defendant to said Hall, for the sum of three hundred dollars, which was unpaid; that suit had afterwards been commenced on said note and mortgage in the Court of Common Pleas, in and for Knox County, in the State of Ohio; that judgment had been obtained in said suit foreclosing said mortgage against the premises conveyed, and that the same was, by the decree of the said court in said cause, ordered to be sold, &c.; that the said plaintiff, Samantha Carver, in order to prevent a sale of the premises, was compelled to, and did, pay off and discharge the judgment so rendered on said note and mortgage, amounting to two hundred and fifty-eight dollars, and seventy-five cents, and costs, &c. For this amount thus paid, judgment is prayed.

The defendant answered, denying many allegations of the petition.

Upon the trial of the cause, the plaintiff read in evidence the deed from defendant, by which the land named in the petition was conveyed to said Samantha Carver. The plaintiff next offered in evidence a certified transcript of the judgment, and proceedings in the Court of Common Pleas, for Knox County, Ohio, referred to in the petition; this transcript was objected to by the defendant for the reason, that it appeared, that defendant was, at the time of the rendition thereof, a citizen of the State of Illinois, and was only notified in said cause by an order of publication published in said cause, and that the court therefore had no jurisdiction of the person of defendant, and that the judgment was therefore void as to defendant, and could not be read in evidence against him.

The court admitted the evidence and the defendant excepted.

The plaintiff then introduced oral evidence, as well as several letters proved to be in the hand writing of the defendant, all of which tended to prove by the admissions of the defendant the existence of the mortgage and the payment of the money therein by the plaintiff, and the promise of defendant to repay the same.

This evidence was also objected to because of its incompetence and irrelevancy; the objections were overruled and the defendant again excepted.

The defendant offered no evidence on his part. The court gave judgment for the plaintiff. The defendant filed a motion for a new trial, and set forth as the grounds upon which said motion was founded, the following:

1st. Because the said verdict and judgment were against the evidence.

2nd. Because the verdict and judgment are against the law.

3rd. Because the verdict and judgment are against the law and the evidence.

4th. Because the verdict and judgment were rendered for the plaintiffs, when the same should have been for the defendant.

This motion was also overruled, and the defendant again excepted and has appealed to this court.

The only objection made in this court to the proceedings and judgment of the Johnson Court of Common Pleas is, that the said court upon the trial of the cause received and heard improper evidence, which ought to have been excluded.

It will be seen, that no such ground of objection was set forth or brought to the attention of the court in the motion filed by the defendant for a new trial. The only grounds of objection set forth in the motion for a new trial are, that the verdict is against the law and the evidence, and is for the wrong party. No question is made in the motion as to the admission or rejection of evidence. Our Statute requires motions for a new trial and in arrest of judgment, to be filed within four days after the trial, if the term of the court shall

so long continue, and at all events before the end of the term; and by § 48, of the fifth Article of the Statute, regulating practice in civil cases, (W. S., 1021) it is provided, that "All motions shall be accompanied by a written specification of the reasons upon which they are founded, and no reason not so specified, shall be urged in support of the motion."

In this case no reason set forth in the motion for a new trial is urged in this court, except the general grounds that the judgment is for the wrong party. We will not, therefore, consider the question as to the admissibility of the evidence, and there is some evidence upon which the finding and judgment might be made; we will not therefore examine that question here.

The question in this case was exactly decided in the case of Cowen vs. The Saint Louis and Iron Mountain Railroad Company, 48 Mo., 556, and in Saxton vs. Allen, 49 Mo., 417.

This judgment will be affirmed; the other Judges concur; Judge Adams did not sit.

END OF JULY TERM, 1873, AT JEFFFRSON CITY.